Petition

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

MASSACHUSETTS DEPARTMENT OF
PUBLIC WELFARE, ET AL.,

Petitioners,

v.

NEWFIELD HOUSE, INC., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Eleventh Amendment to the Constitution of the United States prohibits a federal court from holding state agencies and state officials liable solely on a state-law contract claim.

2. Whether the Attorney General of the Commonwealth constructively waived the protection of the Eleventh Amendment by removing this case to federal court, "generally appearing" in federal court, and filing a compulsory counterclaim.

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NEWFIELD HOUSE, INC., ET AL.,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioners, the Massachusetts Department of Public Welfare, the Commissioner of the Massachusetts Department of Public Welfare, the Massachusetts Department of Public Health, and the Commissioner of the Massachusetts Department of Public Health, respectfully request that a writ of certiorari

issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit, entered in this proceeding on June 4, 1981, as modified on denial of rehearing and rehearing en banc on July 13, 1981.[1/]

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 651 F.2d 32 (1st Cir. 1981) and appears in the Appendix hereto. The transcript of the oral opinion of the

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1/ The other parties to the appeal in the United States Court of Appeals for the First Circuit were as follows: Newfield House, Inc.; Secretary of the United States Department of Health and Human Services; and Clara Caramello, Marie Golden, Adolphine Huriaux, Ruth Kelley, Ada Ortolani, Joseph Rogan, Elizabeth Royle, and Carrie Volta, former patients at Newfield House.

United States District Court for the District of Massachusetts appears in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered on June 4, 1981. A timely petition for rehearing and rehearing en banc was denied on July 13, 1981, and this petition for certiorari was filed within 90 days of that date. This Court has jurisdiction to review the judgment and opinion of the United States Court of Appeals pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Constitution of the United States, Amendment XI

Constitution of Massachusetts, Declaration of Rights, Article XXX

28 U.S.C. § 1441(a)

Mass. Gen. Laws Ann. ch. 12, § 3; ch. 212, § 3; ch. 258, § 2

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STATEMENT OF THE CASE

This case arose as a dispute between a private nursing home (the home) and the Massachusetts Department of Public Welfare (the Department) over which party was responsible for relocating and paying for services rendered to the home's Medicaid patients after the home voluntarily withdrew from the Medicaid program.

The home instituted this action in state court alleging that the refusal of the Department to relocate the home's Medicaid patients or to reimburse the home for services rendered to those patients after the home withdrew from the Medicaid program constituted a violation of federal regulations and state statutes and deprived the home of due process of law. 1st Cir. App. 63-68.[2/] The state court issued a temporary restraining order requiring the Department to reimburse the home for services rendered to Medicaid patients at the private patient rate of $25 per day. 1st Cir. App. 85. The state court and, after removal, the federal court

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2/ The Appendix filed in the First Circuit is referred to as "1st Cir. App." The Appendix to this petition is referred to as "App."

continued that order in force. 1st Cir. App. 92, 645.

The state defendants, the Department and its Commissioner, removed the action to the United States District Court for the District of Massachusetts, pursuant to 28 U.S.C. §§ 1441 and 1442, on the grounds that the action arose under federal law (42 U.S.C. § 1396a(a)(27) and 45 C.F.R. § 250.21) as well as under the Due Process Clause of the Fourteenth Amendment to the United States Constitution and that the defendant Commissioner was sued for actions taken by him under color of federal law and under the supervision of federal officials. The District Court's original jurisdiction was invoked under 28 U.S.C. §§ 1331 and 1343. 1st Cir. App. 15-22. Plaintiff petitioned for remand to the

state court on the ground that, inter alia, the action is in essence a state-law contract claim, over which the District Court had no jurisdiction. 1st Cir. App. 23-43. Plaintiff's motion for remand was denied.

Upon removal to federal court, the defendants moved to dismiss on the grounds that the court lacked subject matter jurisdiction over the claim against the Department, which is immune from suit in federal court under the doctrine of sovereign immunity and the Eleventh Amendment, and that the claims against both defendants failed to state a claim upon which relief could be granted under federal or state law. 1st Cir. App. 95-97. Defendants also filed an Answer, including those same defenses, and a counterclaim seeking to vacate the

state court's preliminary injunction and seeking restitution of the payments made to the home pursuant to the temporary restraining order and preliminary injunction. 1st Cir. App. 98-107.

Plaintiff subsequently amended its Complaint three times to add a common-law contract claim and to add the Massachusetts Department of Public Health, the Secretary of the United States Department of Health, Education and Welfare, and the home's Medicaid patients as defendants. 1st Cir. App. 143-50, 209-23, 346-64. In response to each of these amendments, the state defendants filed amended answers and motions to dismiss reiterating their jurisdictional defenses and their defenses on the merits. 1st Cir. App. 191-94, 258-71, 463-64.

On the basis of the pleadings and the fruits of discovery, the state defendants and the plaintiffs moved for summary judgment. 1st Cir. App. 272-73, 463-64, 556-62. With respect to plaintiff's claims, the District Court granted summary judgment in favor of the state defendants, holding that once the home voluntarily withdrew from the Medicaid program, the state defendants had no legal obligation under federal or state law to relocate the home's Medicaid patients or to reimburse the home for care provided to Medicaid patients. App. 43a-49a. Nevertheless, the District Court ruled in favor of the plaintiff on the state defendants' counterclaim, thereby denying the state defendants restitution of reimbursements made pursuant to the preliminary injunctive

orders, except insofar as such reimbursements exceeded the Medicaid rate. App. 52a-63a. The rationale for holding the Department permanently liable for such reimbursements was that a quasi-contract or "constructive provider agreement" existed between the plaintiff and the Department. App. 53a. The District Court also relied heavily on equitable considerations, such as the relative harm to the state defendants, the home, and the patients. App. 54a, 60a-62a.

The state defendants appealed from the denial of their counterclaim. 1st Cir. App. 1,125. On appeal, the state defendants argued, inter alia, that the District Court erred as a matter of law in holding the state defendants liable to the plaintiff on a quasi-contractual

basis, since such a result is barred by the Eleventh Amendment. The home cross-appealed from the dismissal of its statutory and constitutional claims. 1st Cir. App. 1,126.

The United States Court of Appeals for the First Circuit affirmed, "[v]iewing the matter primarily as one of contractual interpretation." App. 3a. The court stated:

> We agree with the district court that while federal Medicaid provisions do not themselves require such payments, the state's essentially contractual dealings with the home, viewed in light of relevant equitable considerations, do obligate it to reimburse the home for the services provided. App. 11a.

In light of its conclusion that the state had no federal-law obligation to reimburse the home once the home with-

drew from the Medicaid program, the court stated that "this dispute must be viewed primarily as a contractual problem." App. 17a. Applying common-law contract principles to the facts of the case, the court concluded that an implied-in-fact contract, or at least a constructive implied-in-law contract, existed between the home and the state, requiring the state to continue to pay for care until the home's patients were relocated. App. 17a-33a.

The First Circuit rejected the state defendants' contention that such a result was barred by the Eleventh Amendment and found that the state defendants, through the Attorney General, had waived the protection of the Eleventh Amendment by removing this case to federal court. App. 18a-20a n. 3. After an unsuccessful

petition for rehearing and rehearing en banc, App. 66a-70a, the present Petition for Certiorari was filed.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH AMENDMENT QUESTIONS PRESENTED BY THIS PETITION ARE IMPORTANT NOT ONLY TO MASSACHUSETTS, BUT TO ALL OTHER STATES, STATE AGENCIES, AND STATE OFFICIALS.

The central issue on the merits of this case before the lower courts was whether the state was required to reimburse the home for care provided to Medicaid patients after Newfield House voluntarily withdrew from the Medicaid program.[3/] The First Circuit found no

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3/ As noted by the First Circuit, the precise legal and factual questions raised by the merits of this case are not

(footnote continued)

basis in federal law for imposing such an obligation on the state. App. 11a. Rather, viewing the matter "primarily as a contractual problem," App. 17a, the court held that the state had a common-law contractual or quasi-contractual obligation to continue to pay for care until the patients were relocated.[4/] App. 17a-33a. In so holding, the court

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(footnote continued)

likely to recur. App. 5a. However, as discussed herein, the jurisdictional questions concerning the Eleventh Amendment, which are the subject of this petition, arise in virtually every case in which states, state agencies, or state officials are sued in federal court or choose to remove a case to that forum.

4/ Since, by the time the District Court ruled on the merits of this case, the affected patients had been relocated or had died, 1st Cir. App. 645, the effect of the relief ordered by the District Court and affirmed by the First Circuit was entirely retroactive.

dismissed, in a single footnote, the petitioners' claim of Eleventh Amendment immunity from liability for contract damages in federal court. App. 18a-20a n. 3.

The unprecedented effect of this decision on the petitioners and on other states, state officials, and state agencies is to expose them to liability for monetary damages in federal court even in cases where no violation of federal law has been found. Medicaid providers and other state contractors will inevitably rely on this decision to bring their contractual and quasi-contractual disputes with state agencies into federal court. Furthermore, since resolution of such controversies "requires an intensive fact-specific inquiry," such

cases, even if without merit, will involve protracted litigation in the federal courts on state-law claims. Such liability and litigation are precisely what the Eleventh Amendment was designed to avoid. See, e.g., Edelman v. Jordan, 415 U.S. 651, 660-62 (1974).

The First Circuit's further holding that the state waived its rights under the Eleventh Amendment, primarily by removing this case to federal court, has the significant and deleterious effect of precluding states from obtaining federal court review of their alleged noncompliance with federal law, a right unconditionally conferred by Article III of the United States Constitution as well as by 42 U.S.C. §§ 1331 and 1441, without at the same time forfeiting their Elev-

enth Amendment immunity from liability on state-law claims. Conditioning the removal of federal law claims upon a waiver of the state's constitutional rights upsets the well-established balance between federal and states' rights which lies at the heart of the United States Constitution.

Because of the important constitutional questions presented by this case and the significant impact that the resolution of those questions will have on the on-going relationship between state governments and federal courts, the present petition should be granted.

II. THE LOWER COURTS' FAILURE TO DISMISS THE STATE AGENCY DEFENDANTS DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN ALABAMA V. PUGH.

In the case of Alabama v. Pugh, 438 U.S. 781, 782 (1978), this Court unequivocally ruled that suits against state agencies are barred by the Eleventh Amendment. See also Kennecott Copper Corp. v. State Tax Commission, 327 U.S. 573, 577 (1946). Unlike suits against state officials, which are permissible under certain circumstances, see Ex parte Young, 209 U.S. 123 (1908), and section III, infra, suits against state agencies are barred even where the relief granted is injunctive and prospective in nature. Alabama v. Pugh, supra. This absolute bar to suits against state agencies is "not merely academic," id. at

782, but rather must be enforced even when numerous state officials are also named as defendants in the same action. Id. at 781.

In the present case, two state agencies, the Department of Public Welfare and the Department of Public Health, were named as defendants. 1st Cir. App. 63, 143. Both agencies moved to dismiss on the ground of lack of subject matter jurisdiction, based on their immunity from suit in federal court under the Eleventh Amendment. 1st Cir. App. 95, 191.[5/]

The District Court summarily rejected this claim, mistakenly focusing

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5/ This jurisdictional defense was raised repeatedly both in the District Court (1st Cir. App. 230-33, 265, 271, 463, 1,054, 1,056-59) and in the First Circuit. Brief of Defendants-Appellees at 14-15, 20, 28 n. 30.

on the nature of the relief granted and failing to distinguish between state officials and state agencies. App. 55a. This compound error was adopted by the First Circuit, which simply stated, without supporting authority, "[W]e agree that the relief ordered by the district court is not barred by the Eleventh Amendment." App. 18a n. 3.

The lower courts' failure to heed the clear directive of this Court in Alabama v. Pugh, that claims against state agencies in federal courts must be dismissed, in itself warrants the allowance of certiorari in this case.

III. THE FIRST CIRCUIT'S HOLDING THAT CONTRACTUAL LIABILITY IS NOT BARRED BY THE ELEVENTH AMENDMENT IS CONTRARY TO THE VERY PURPOSES OF THAT AMENDMENT, AS CONSISTENTLY ARTICULATED BY THIS COURT.

A. The Eleventh Amendment Prohibits Federal Jurisdiction over Contract Claims Against State Agencies and Officials.

The Eleventh Amendment was enacted for the purpose of protecting states from the very kind of liability that was imposed by the District Court and affirmed by the First Circuit in this case--an award of contract damages by a federal court against a state government.[6/]

6/ This relief was originally granted in the form of a preliminary injunction. The District Court subsequently permitted plaintiff to retain the money (in the face of state defendants' counterclaim for restitution) on quasi-contractual grounds, and the First Circuit affirmed solely on the basis of an express or implied contract.

In response to the Supreme Court's decision in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1792), holding that a citizen of one state could sue another state government in federal court to enforce payment of a debt, the states pressed for and then ratified the Eleventh Amendment in order to protect their treasuries from further incursions by the federal judiciary. See Edelman v. Jordan, supra at 660-62.

Consistent with the purpose of the Eleventh Amendment, this Court has construed it to bar all actions which, in essence, seek to recover money from the state, see, e.g., Hagood v. Williams, 117 U.S. 52, 68-71 (1886); In re Ayers, 123 U.S. 443, 502 (1887); Hans v. Louisiana, 134 U.S. 1, 20 (1890); Murray v. Wilson Distilling Co., 213 U.S. 151, 168

(1909); Edelman v. Jordan, supra at 663; Quern v. Jordan, 440 U.S. 332, 337 (1979), even if the action is characterized as one for equitable relief. Quern v. Jordan, supra at 337; Edelman v. Jordan, supra at 665.

B. The Eleventh Amendment Bars Relief Against State Officials Who Have Not Violated Federal Law.

The Eleventh Amendment has been construed to permit actions against state officials, having an ancillary impact on the state treasury, but only in certain limited circumstances. See Ex parte Young, supra at 159-60; In re Ayers, supra at 506-07. The Eleventh Amendment permits federal court actions against state officials in their official capacities only where necessary to require state officials "to conform their future conduct to the requirements of federal

law." Quern v. Jordan, supra at 337; see also Milliken v. Bradley, 433 U.S. 267, 289 (1977). On the other hand, where the relief sought is "not as a necessary consequence of compliance in the future with a substantive federal-question determination," such relief is barred by the Eleventh Amendment. Edelman v. Jordan, supra at 668; see also Note, A Practical View of the Eleventh Amendment--Lower Court Interpretations and the Supreme Court's Reaction, 61 Geo. L. J. 1473 (1972-73).

In the present case the First Circuit found no basis in federal law to award relief against the state defendants, but rather affirmed the District Court's order of such relief based solely on contractual, state law grounds. App. 11a. Since the relief granted was not

necessary to conform the conduct of state officials to federal law, Ex parte Young and its underlying rationale have no bearing on this case. Where there is no violation of federal law, there is no basis for the federal courts to intrude upon the constitutionally mandated sovereignty of the state. The award of relief against state officials in this case is therefore in direct violation of the Eleventh Amendment, as consistently construed by this Court.

IV. THE JUDGE-MADE DOCTRINE OF PENDENT JURISDICTION CANNOT BE USED TO CIRCUMVENT THE CONSTITUTIONAL BAR OF THE ELEVENTH AMENDMENT.

In an attempt to circumvent the limitation on judicial power imposed by the Eleventh Amendment, the First

Circuit relied on the judge-made doctrine of pendent jurisdiction. App. 18a n. 3. Such reliance directly conflicts with well-established jurisdictional principles repeatedly enunciated by this Court.

In United Mine Workers v. Gibbs, 383 U.S. 715 (1966) (the only authority relied on by the First Circuit on the issue of pendent jurisdiction), this Court set forth a two-step analysis for determining whether a federal court can and should exercise pendent jurisdiction over state-law claims. The first step is to determine whether judicial power over those claims exists under Article III of the United States Constitution. Id. at 725. Since in the Gibbs case there were no state defendants, the limitation on judicial power contained in

the Eleventh Amendment was not considered. However, in the earlier case of Missouri v. Fiske, 290 U.S. 18 (1933), this Court expressly held that the Eleventh Amendment barred a federal court from exercising ancillary jurisdiction over a claim against a state:

> The Eleventh Amendment is an explicit limitation of the judicial power of the United States. . . . However important that power, it cannot extend into the forbidden sphere. Considerations of convenience open no avenue of escape from the restriction. The "entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given."

Id. at 25-26.

Similarly, in Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 374

(1978), this Court held that "[t]he limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded," and therefore ruled that the lower courts had erred in assuming pendent or ancillary jurisdiction over claims expressly excluded from federal jurisdiction by statute. See also Aldinger v. Howard, 427 U.S. 1, 18 (1976); Ware v. United States, 626 F.2d 1278, 1287 (5th Cir. 1980); Lenoir v. Porters Creek Watershed District, 586 F.2d 1081, 1087 (6th Cir. 1978). Certainly if the scope of pendent jurisdiction is limited by statute, it is also circumscribed by the express limitation on the federal courts' constitutional powers contained in the Eleventh Amendment. In exercising pend-

ent jurisdiction in this case, the First Circuit overstepped the boundary of its constitutional power, contrary to the clear directives of this Court.[7/]

Furthermore, even if it were within the power of the federal courts to exercise pendent jurisdiction over plaintiff's state-law claims in this case, it would be an abuse of discretion to do so. As recognized in United Mine Workers v. Gibbs, supra at 726, "[t]hat power need not be exercised in every case in

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7/ Insofar as the First Circuit relied on Fed. R. Civ. P. 18(a) to expand its judicial power beyond the limits of the Eleventh Amendment, it also acted in violation of Fed. R. Civ. P. 82, which provides that the Federal Rules "shall not be construed to extend or limit the jurisdiction of the United States district courts . . . ." See also United Mine Workers v. Gibbs, supra at 725 n. 13.

which it is found to exist." Moreover, in the same case this Court directed that such power should not be exercised where the federal claims, to which the state claims are pendent, are dismissed before trial, even though the federal claims are "not insubstantial in a jurisdictional sense." Id. at 726.[8/]

Since, in this case, all of plaintiff's federal claims were disposed of on pre-trial motions to dismiss or for summary judgment, the District Court abused its discretion in retaining jurisdiction over plaintiff's state-law contract claim.

8/ This Court's approval of the exercise of pendent jurisdiction in Hagans v. Lavine, 415 U.S. 528, 536 (1974), and Rosado v. Wyman, 397 U.S. 397, 404 (1970), is immaterial to the issues raised by this case, since the pendent claims in those cases were federal not state-law claims, making the exercise of federal jurisdiction particularly appropriate.

V. THE FIRST CIRCUIT'S HOLDING THAT THE MASSACHUSETTS ATTORNEY GENERAL CONSTRUCTIVELY WAIVED THE ELEVENTH AMENDMENT VIOLATES ESTABLISHED PRINCIPLES OF WAIVER.

A. There Can Be No Constructive Waiver of the Eleventh Amendment.

In Edelman v. Jordan, supra at 673, this Court firmly rejected the notion that a state could "constructively consent" to suit in federal court:

> Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."

Id., quoting from Murray v. Wilson Distilling Co., supra at 171; see also Great Northern Life Insurance Co. v. Read, 322 U.S. 47, 54 (1944) (requiring "a clear declaration of the state's intention to submit its fiscal problems to [federal] courts"); Kennecott Copper Corp. v. State Tax Commission, supra at 577 (same).

Despite this Court's clear proclamation in the Edelman case that a state's waiver of the Eleventh Amendment must be express, the Fifth Circuit in Florida Nursing Home Association v. Page, 616 F.2d 1355, 1363 (5th Cir. 1980), in order to avoid "an inequitable result," inferred a waiver of the Eleventh Amendment from Florida's consent to be sued in state court and from its participation in the Medicaid program. This Court

summarily reversed, stating that in finding a constructive waiver, the circuit court "misapplied the prevailing standard for finding a waiver of the state's immunity under the Eleventh Amendment." Florida Department of Health & Rehabilitative Services v. Florida Nursing Home Association, 101 S. Ct. 1032, 1034 (1981). The First Circuit's finding of waiver in the present case, despite the absence of any express consent by the state, though perhaps similarly motivated by a desire to reach an equitable result, suffers from the same infirmity as the Fifth Circuit's decision in the Florida case and should be reversed on the same grounds.[9/]

9/ The First Circuit's inference of waiver, based on the conduct of state

(footnote continued)

B. The Massachusetts Attorney General Is Not Expressly Authorized to Waive the State's Eleventh Amendment Immunity.

The First Circuit's finding of waiver in this case is based on actions taken by the state Attorney General in conduct-

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(footnote continued)

officials in this case also conflicts with the parallel principle that the sovereign immunity of the United States cannot be waived by federal officials. United States v. United States Fidelity & Guaranty Co., 309 U.S. 506, 513-14 (1940); see also Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) (sovereign immunity of Indian tribe "cannot be implied but must be unequivocally expressed"). There is no principled reason to distinguish between federal and state officials in this regard. Moreover, since the immunity of state officials is rooted in the constitution, federal courts should be even more reluctant to find an implied waiver of Eleventh Amendment immunity on behalf of separate sovereign states than of the common-law sovereign immunity of the federal government.

ing this litigation. App. 19a n. 3. In making the threshold determination that the Massachusetts Attorney General has the authority to waive the Eleventh Amendment, the court misapplied the standard set forth by this Court in Ford Motor Co. v. Department of the Treasury, 323 U.S. 459 (1945). In that case, this Court held that where a state has a policy that sovereign immunity may be waived only by general law, "it is not to be presumed in the absence of clear language to the contrary, that [the state legislature] conferred on administrative or executive officers discretionary power to grant or withhold consent in individual cases." (Emphasis added.) Id. at 468.

Massachusetts, like Indiana, has a well-established policy that "the Commonwealth can be impleaded only on consent

and in the manner and extent expressed by statute." Broadhurst v. Director of the Division of Employment Security, 373 Mass. 720, 723 n. 6, 369 N.E.2d 1018, 1020 (1977). A waiver of that immunity requires "specific affirmative authority," id., 373 Mass. at 722, 369 N.E.2d at 1020, and "cannot be extended beyond [that] expressly conferred by statute." Id., 373 Mass. at 727, 369 N.E.2d at 1023. Such a waiver may not be presumed or inferred. McArthur Brothers Co. v. Commonwealth, 197 Mass. 137, 142, 83 N.E. 334 (1908); Burroughs v. Commonwealth, 224 Mass. 28, 31, 112 N.E. 491 (1916).

Given this strong and well-settled state policy against implied waiver, the First Circuit was required to follow this Court's admonition in the Ford Motor Company case that an attorney general's

authority to waive sovereign immunity "is not be presumed in the absence of clear language to the contrary." Id. at 468. However, the First Circuit flatly violated that standard by presuming that the Massachusetts Attorney General possesses such authority since their review of Massachusetts law revealed "nothing . . . to contradict that view." App. 19a n. 3.

To the extent that the First Circuit's inference of the Attorney General's authority to waive the Eleventh Amendment was based on his "broad power to direct state litigation in all forums," App. 19a n. 3, citing, Mass. Gen. Laws Ann. ch. 12, § 3, such an inference was ruled out by this Court in Ford Motor Co. v. Department of Treasury, supra at

468, and is also in direct conflict with the decisions of other federal courts of appeals. See, e.g., Dagnall v. Gegenheimer, 631 F.2d 1195, 1196 (5th Cir. 1980); Linkenhoker v. Weinberger, 529 F.2d 51, 53 (4th Cir. 1975); O'Connor v. Slaker, 22 F.2d 147, 152 (8th Cir. 1927), appeal dismissed, 278 U.S. 188 (1929).

Moreover, such an inference conflicts with Massachusetts' own views concerning the powers of its Attorney General. Massachusetts' highest court, in the same case in which it expounded upon the broad powers of the Attorney General, recognized that the state has not consented to be sued in federal court. Feeney v. Commonwealth, 373 Mass. 359, 365, 366 N.E.2d 1262, 1266 (1977). Despite the Attorney General's broad powers

within the executive branch, he is prohibited by the Massachusetts Constitution from "exercis[ing] the legislative and judicial powers, or either of them." Constitution of Massachusetts, Declaration of Rights, Article XXX; see also 6 Op. A.G. 438 (Mass. 1922).[10/]

10/ It is particularly instructive to note that, in defining the scope of the Attorney General's powers, the Supreme Judicial Court has stated that he has the power to function "much in the way the United States Solicitor General does regarding the legal affairs of the Federal government." Secretary of Administration & Finance v. Attorney General, 367 Mass. 154, 164, 326 N.E.2d 334, 339 (1975), since this Court has held that neither the United States Attorney General nor any of his subordinates have the authority to waive sovereign immunity. United States v. United States Fidelity & Guaranty Co., supra at 513; Stanley v. Schwalby, 162 U.S. 255, 270 (1896).

Furthermore, a more thorough review of Massachuetts law than that undertaken by the First Circuit reveals a strong legislative intent not to consent to suit in federal court. Although Massachusetts has consented to be sued to some extent in contract and in tort, Mass. Gen. Laws Ann. ch. 258, the state legislature has declared that the Massachusetts superior court "shall have exclusive original jurisdiction . . . of claims aganst the commonwealth," (emphasis added) Mass. Gen. Laws Ann. ch. 212, § 3, and that "[t]he remedies provided by [chapter 258] shall be exclusive of any other civil action or proceeding by reason of the same subject matter against the public employer." (Emphasis added.) Mass. Gen. Laws Ann. ch. 258, § 2. The state's highest court has construed those provi-

sions as "based upon a sound public policy . . . in favor of not permitting the interests of sovereignty to be passed upon by any tribunal save the [superior] court itself." McArthur Brothers Co. v. Commonwealth, 197 Mass. at 141-42.[11/]

Since the First Circuit's threshold determination that the Massachusetts

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11/ This Court has held repeatedly that a state's consent to be sued in its own courts cannot be construed as a waiver of its Eleventh Amendment immunity from suit in federal court. See, e.g., Florida Department of Health & Rehabilitative Services v. Florida Nursing Home Association, supra at 1034; Petty v. Tennessee-Missouri Bridge Commission, 359 U.S. 275, 276 (1959). The issue of whether Massachusetts intended to waive the Eleventh Amendment by consenting to be sued in tort in its own courts is presently before the Massachusetts Supreme Judicial Court, as a question certified by the United States District Court for the District of Massachusetts in Irwin v. Calhoun, No. 80-1818-G.

Attorney General is authorized to waive the Eleventh Amendment directly conflicts not only with the decisions of this Court and other federal courts of appeals, but also with Massachusetts law as construed by its highest court, certiorari should be granted on this issue.

C. The Attorney General Did Not Waive the Eleventh Amendment by "Generally Appearing," Removing the Case to Federal Court, or Filing a Compulsory Counterclaim.

This Court in Edelman v. Jordan, supra at 677-78, held that "it has been well settled since the decision in Ford Motor Co. v. Department of Treasury, supra, that the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need

not be raised in the trial court." Therefore, in spite of the fact that the respective attorneys general of Indiana and Illinois appeared "generally" in the lower federal courts, without raising the Eleventh Amendment as a defense, this Court refused to find a waiver on that ground.[12/] Id. See also MacDonald v. Board of Regents, 371 F.2d 818, 819 (6th Cir. 1967); Aerojet-General Corp. v. Askew, 453 F.2d 819, 828 (5th Cir. 1971), cert. denied, 409 U.S. 892.

12/ Insofar as the earlier case of Clark v. Barnard, 108 U.S. 436, 447 (1883), relied upon by the First Circuit, holds to the contrary, it has been implicitly overruled by this Court. If certiorari is granted in this case, petitioners will urge this Court to expressly overrule that case so as to avoid any further confusion on this issue.

Moreover, even if a general appearance could be construed as a waiver of the Eleventh Amendment, the Attorney General did not appear "generally" in this case, but rather raised the Eleventh Amendment defense immediately upon removal to federal court. 1st Cir. App. 95-97. Under the modern rules of pleading, such a defense is not waived by joinder with a defense on the merits. Fed. R. Civ. P. 12(b). In fact, the effect of Rule 12(b) of the Federal Rules of Civil Procedure is to abolish the technical distinctions between general and special appearances and to make a "special appearance" to contest jurisdiction unnecessary. 2A Moore's Federal Practice ¶¶ 12.02, at 2226; 12.12, at 2324-25 (2d ed. 1968); 5 C. Wright & A. Miller, Fed-

eral Practice and Procedure ¶ 1344, at 520-24 (1969 ed.).

Similarly, the First Circuit's unsupported conclusion that "the state has waived its rights under [the Eleventh A]mendment by having the case removed to federal court," App. 19a n. 3, conflicts in principle with the decisions of this court and other federal courts of appeal.

In Freeman v. Bee Machine Co., 319 U.S. 448, 454 (1943), this Court made it clear that upon removal to federal court a suit is to proceed as if it had been commenced there. Moreover, Fed. R. Civ. P. 81(c) specifically provides that removed actions are governed by the federal rules. Accordingly, pursuant to Fed.

R. Civ. P. 12, a defense or objection is lost in the federal court only if it is not raised in the manner prescribed by that rule. See 5 C. Wright & A. Miller, Federal Practice and Procedure ¶ 1395, at 873 (1969 ed.). Therefore, removal to federal court is not a waiver of jurisdictional defenses, including the Eleventh Amendment, which may be raised at any time. Fed. R. Civ. P. 12(h). See Edelman v. Jordan, supra at 678.

As held by this Court in American Fire & Casualty Co. v. Finn, 341 U.S. 6, 17-18 (1951), "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties." To permit a federal trial court to enter a judgment in a

removed case where that judgment is not within the judicial power of the federal courts, "would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress [and, in the present case, the Constitution] has denied them." Id. at 18.

Even the party who removed the case to federal court may later challenge that court's power to adjudicate the case, despite the awkwardness or apparent inequity of such a procedural posture.[13/] Mansfield, Coldwater &

13/ In the present case there is no inherent contradiction between petitioners' removal of the case (and resistance to remand) on the grounds of federal question jurisdiction, 28 U.S.C. § 1441(a), and their subsequent assertion that the Eleventh Amendment bars any relief on plaintiff's state-law contract claims.

(footnote continued)

Lake Michigan Railway Co. v. Swan, 111 U.S. 379, 382 (1884); General Investment Co. v. Lake Shore & Michigan Southern Railway Co., 260 U.S. 261, 268 (1922); Mechanical Appliance Co. v. Castleman, 215 U.S. 437, 441 (1910); see also Hudson v. Smith, 618 F.2d 642, 644 (10th Cir. 1980).

(footnote continued)

The Complaint which petitioners removed to federal court clearly arose under federal law, and, in fact, contained no state-law contract claim. 1st Cir. App. 63-68. Petitioners did not contest the substantiality of those purely federal claims for jurisdictional purposes, and if plaintiffs had prevailed on those claims, the Eleventh Amendment would not have barred appropriate injunctive relief against state officials if such relief was required to conform their conduct to federal law. See section IIIB, supra. What petitioners did contend in the lower courts and do contend in this petition, is that the federal courts have no power to hold state agencies and state officials liable solely on a state-law contract claim.

This rule has been consistently applied by the federal courts (including the First Circuit) to permit removing parties to raise jurisdictional objections.[14/] The present case stands out as a glaring exception, unduly prejudicing states and state officials within the First Circuit from having federal claims against them heard by the federal courts without forfeiting their constitutional immunity from state-law liabil-

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14/ See, e.g., Medlin v. Boeing Vertol Co., 620 F.2d 957, 960 (3rd Cir. 1980); Belle View Apartments v. Realty ReFund Trust, 602 F.2d 668, 669 (4th Cir. 1979); Garden Homes, Inc. v. Mason, 238 F.2d 651, 653 (1st Cir. 1956); Moss v. Atlantic Coastline Railroad Co., 157 F.2d 1005, 1006 (2d Cir. 1946), cert. denied, 330 U.S. 839, including that of sovereign immunity. Minnesota v. United States, 305 U.S. 382, 388-89 (1939); Hudson County Board of Chosen Freeholders v. Morales, 581 F.2d 379, 382 (3rd Cir. 1978); Stapleton v. $2,438,110, 454 F.2d 1210, 1218 (3rd Cir. 1972), cert. denied, 409 U.S. 894.

ity in federal court.

Whether a state's removal of a case to federal court constitutes a waiver of the Eleventh Amendment is an important question of federal law which should be decided by this Court, particularly since the First Circuit's resolution of this question conflicts with principles enunciated by this Court and followed by other federal courts.

The same jurisdictional principles that militate against a finding of waiver by general appearance or removal apply equally to a finding of waiver based upon the filing of a counterclaim. See also Neifeld v. Steinberg, 438 F.2d 423, 429-30 (3rd Cir. 1971).

In addition, the First Circuit's reliance on the petitioners' counter-

claim as a waiver of the Eleventh Amendment in this case is particularly unfounded, given the compulsory nature of that counterclaim.[15/] Since the counterclaim was compulsory, it would have been forever barred if not raised in this action. Id. As stated by Barron and Holtzoff, finding a waiver in such circumstances violates a party's right to the essence of fair play, "since there defendant has no choice but is coerced in asserting his claim as a counter-

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15/ There can be no question that petitioners' counterclaim in this case was compulsory within the meaning of Fed. R. Civ. P. 13(a), since it merely sought to recover what plaintiff obtained by means of preliminary relief on its Complaint. It therefore obviously arose "out of the transaction or occurrence that is the subject matter of the opposing party's claim." See Baker v. Gold Seal Liquors, Inc., 417 U.S. 467, 469 n. 1 (1974).

claim." 1A Barron & Holtzoff, Federal Practice and Procedure § 370.2, at 536; see also Dragor Shipping Corp. v. Union Tank Car Co., 378 F.2d 241, 244 (9th Cir. 1967); Hasse v. American Photograph Co., 299 F.2d 666, 668-69 (10th Cir. 1962); 5 C. Wright & A. Miller § 1397, at 879-80.

Finally, even if the Eleventh Amendment could be constructively waived by the Attorney General under some circumstances, no inference of waiver could reasonably be made in this case. Such an inference is precluded by the Attorney General's expressed intent, at every stage of this proceeding, not to waive the Eleventh Amendment but rather to vigorously assert it from his first appearance in the federal court to this very petition.

VI. THE FIRST CIRCUIT'S DEPARTURE FROM THE USUAL COURSE OF JUDICIAL PROCEEDINGS CALLS FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS.

A final, and perhaps most important, reason for granting a writ of certiorari in this case is to correct, in this Court's role as overseer of the federal courts, the constitutional, jurisdictional, and procedural errors committed by the First Circuit, outlined in the preceding sections. Particularly since these errors directly affect the constitutional rights of states in relation to the federal courts and involve the application, or misapplication, of jurisdictional principles and of the Federal Rules of Civil Procedure, this Court's supervisory intervention is called for.

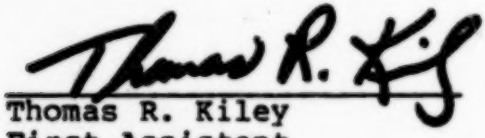
If the First Circuit's decision in this case is permitted to stand, states within this circuit face unlimited exposure to monetary liability in the federal courts, contrary to the very purpose of the Eleventh Amendment. In addition, unless these states wish to submit themselves to such liability, they will be precluded from using their statutory right of removal as a means of obtaining federal-court review of federal claims that are indisputably within the jurisdiction of the federal courts. Conditioning the exercise of the removal power on the waiver of a state's constitutional rights not only violates well-established principles of federalism but precludes the Attorney General from carrying out his public duty of effectively representing his clients in all forums.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL



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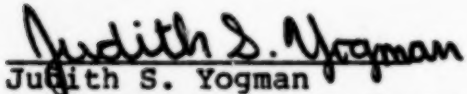

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Date: October 13, 1981

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 80-1541
80-1554

NEWFIELD HOUSE, INC.,

Plaintiff-Appellant,

v.

MASSACHUSETTS DEPARTMENT OF
PUBLIC WELFARE ET AL.,

Defendants-Appellees.

APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS
[Hon. W. Arthur Garrity, Jr.,
U.S. District Judge]

Before Coffin, Chief Judge
Winter, Circuit Judge,*/
Skinner, District Judge.**/

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*/ Of the Fourth Circuit, sitting by designation.

**/ Of the District of Massachusetts, sitting by designation.

Kenneth A. Behar, with whom Barbara J. Sproat, John F. O'Leary, and O'Leary, Behar & Kalman were on brief, for Newfield House, Inc.

Judith S. Yogman, Assistant Attorney General, with whom Francis X. Bellotti, Attorney General, Garrick F. Cole, Special Assistant Attorney General, and Hill & Barlow, were on brief, for Massachusetts Department of Public Welfare, et al.

Carolyn S. Grace, Assistant United States Attorney, with whom Edward F. Harrington, United States Attorney, was on brief for Secretary of Health and Human Services.

June 4, 1981

Coffin, Chief Judge. This case requires us to determine the proper allocation of the costs of health care for

Medicaid-funded residents of a nursing home in the period between the home's voluntary withdrawal from participation as a Medicaid provider and the successful relocation of the patients to other facilities. The question, clearly one for which none of the parties had planned, was at the relevant time not addressed directly by any state or federal statute or regulation. Viewing the matter primarily as one of contractual interpretation, we affirm the district court's ruling that the state was required to pay for such care at the rate paid prior to the home's withdrawal.

I

The plaintiff, Newfield House, Inc. ("Newfield House" or "the home"), a nursing-home health-care facility duly

licensed by the Massachusetts Department of Public Health, served as a provider of nursing home services in the Medicaid program since the inception of the program in Massachusetts. Newfield House provided care for both Medicaid and non-Medicaid patients, charging a rate of $19.70 per day for the former and $25.00 per day for the latter. Until May 1975, Newfield House, apparently like other nursing home providers in Massachusetts, participated in the Medicaid program without any written agreement. On May 17, 1975, the federal Department of Health, Education and Welfare (HEW) sent a letter to the Massachusetts Department of Public Welfare (DPW), directing it to enter into written provider contracts with all nursing home providers as a condition of receiving the 50 percent fed-

eral financial participation provided by the program. Newfield House received DPW's proposed provider contract on May 30, and immediately replied that it would not continue as a Medicaid provider under the terms of that agreement. It proposed an alternative agreement, under which it would continue to provide services for the ten patients then receiving Medicaid payments, but only at its higher private patient rate. DPW rejected this offer, and Newfield House refused to sign an agreement providing for limited interim continuation at the prior Medicaid rate. DPW informed Newfield House on August 24, 1976 that, because the home had not signed a provider agreement, DPW would terminate Medicaid payments to it as of October 1, 1976.

Prior to October 1, Newfield House brought suit in Massachusetts Superior Court to enjoin DPW from terminating payments to it for its ten Medicaid patients unless and until the department relocated the patients to other facilities. The court entered a temporary restraining order directing DPW to pay for nursing home services for the home's Medicaid patients at the home's private patient rate of $25 per day. The order was initially continued for 15 days by agreement of the parties, and was subsequently ordered continued while the case was assigned for trial on an expedited basis.

Before trial was to begin, however, DPW removed the case to federal district court, and that court denied Newfield House's motion to remand the case to state superior court. Defendants moved

to dissolve the state court restraining order, but the district court maintained the order in effect and ultimately denied the motion on grounds of mootness. With the district court's permission, Newfield House added the Secretary of HEW, the Massachusetts Department of Public Health (DPH), and the Medicaid-funded patients then residing at the home as defendants. In addition, DPW brought a counterclaim against Newfield House seeking return of all money paid under the restraining order, and Newfield House added its Medicaid patients as third-party defendants on that counterclaim. Both Newfield House and some of the patients' families petitioned the court for appointment of a guardian ad litem to represent the patients, but the district court declined to act on the petitions and, with

one limited exception, no patient ever appeared in the case. At the close of the case, the court granted HEW's motion to dismiss it from the action.

On the central issue presented, the district court ordered Newfield House to repay to DPW the excess of the payments made under its interim order at the home's private patient rate of $25 per day over the amount that would have been due at its Medicaid rate of $19.70 per day, but only that excess (a total of $8,538.74 of the $53,305.31 paid). The court first drew a sharp distinction between voluntary and involuntary terminations of nursing home provider arrangements, and held that the federal Medicaid regulations in force at all times relevant here imposed no obligation on the state to provide such pay-

ments in the case of a voluntary termination. But the court went on to conclude that "unusual circumstances" present in this case supported a finding of a "constructive provider agreement" between the state and the home during the pendency of this dispute--citing such circumstances as the uncertainty surrounding the parties' obligations, the fact that the state would have been required "with minor exceptions" to provide care for Newfield House's patients at the same or greater rates at other facilities, and the existence of the temporary restraining order issued by the state court and continued by the federal court.

Emphasizing that providing for the care of the patients had been its central concern throughout the litigation, the court stressed that such relevant equi-

table/contractual factors as unjust enrichment and detrimental reliance in its view mitigated against the state and in favor of the home and its patients. The court held that its refusal to return to the state all the payments made to the home did not violate the Eleventh Amendment, since such payments had been prospective with respect to the then-valid interim orders pursuant to which they were made. Finally, the court suggested that the state pursue administrative remedies seeking reimbursement from the federal government, expressing the view that while it could not order such reimbursement (since the state had not exhausted available administrative remedies) it did not think those remedies necessarily futile.

II

The central issue posed by this case is whether either federal statutes and regulations or the state's own prior actions require the state to pay Newfield House for care provided to Medicaid-eligible patients between the time Newfield House withdrew from the Medicaid program and the time those patients were successfully relocated. We agree with the district court that while federal Medicaid provisions do not themselves require such payments, the state's essentially contractual dealings with the home, viewed in light of relevant equitable considerations, do obligate it to reimburse the home for the services provided. We note that this precise legal question will not recur in Massachusetts, since the state has subsequently sought to do pre-

cisely what our analysis suggests it must do to avoid such a liability: enact legislation placing the burden of interim or relocation costs on providers. We of course express no view on the actual effect of that statute or subsequent regulations. See Mass. Gen. L. ch. 118, § 4; 106 C.M.R. § 456.401-05.

We first focus on Newfield House's attempt to find a basis in federal law for imposing a duty upon the state to relocate patients or pay for their continued care at a withdrawing facility. Its argument relies on one HEW regulation, 42 C.F.R. § 449.10(b)(15)(v) (1977), on two interpretations of that regulation, and on two related HEW guidelines. The regulation provides that a state can receive federal funds for pay-

ments for up to 30 days care to an institution whose provider agreement "has expired or otherwise terminated", but only for previously admitted patients and--most critically--only "if the state agency makes a showing satisfactory to the Secretary that it has made reasonable efforts to facilitate the orderly transfer of such individuals from such facility to another facility." Two HEW documents interpret this regulation. First, and most favorably to the plaintiff, a manual issued by HEW's Office of Nursing Home Affairs, apparently applicable even where a facility voluntarily withdraws from Medicaid, sets forth a view of relocation responsibilities that strongly implies state responsibility for reloca-

tion costs and interim expenses.[1/] Second, following HEW's agreement to a consent decree of general applicability in Cornell v. Creasy, Civ. No. C77-434

1/ Section 6062 of the Office's Long Term Care Manual states: "[the state] has the primary responsibility for deciding that such patients are to be relocated . . . and for ensuring their safe and orderly transfer from a facility that no longer participates in Medicaid to another participating facility. The fact that a facility no longer participates in Federal programs does not mean that patients who rely on medicaid assistance to pay for care will necessarily be relocated. Many of the patients may be providing pay or the State may decide to pay 100 per cent of the cost of care of medical assistance patients. Regardless of the facility's status under the Federal programs, the State remains responsible for the care and services provided therein to public assistance patients and for making decisions, as appropriate, to transfer such patients to other Medicaid participating facilities . . . . Each State should develop a State long term care patient relocation plan for the orderly transfer of patients. In specific terms, the plan should provide for: decisions to be made on relocation of patients on a case-by-case basis; . . . ." [detailed specifications omitted].

(N.D. Ohio 1978), and subsequent to the events at issue in this case, HEW's Health Care Finance Administration issued guidelines detailing state agencies' responsibilities for transferring patients.[2/] In addition, other divisions of HEW have in other contexts

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2/ The guidelines assert that the consent decree "set forth HEW's interpretations of the State agencies' obligations to provide for an 'orderly transfer' of the recipient in cases of mass transfers due to a facility's decertification or withdrawal from the Medicaid program. HEW interprets 'transfer' to be a process rather than a short period of time covering a physical relocation. The Departmental interpretation reflects existing policy position in specifying minimum regulatory requirements. . . . In order for the transfer process to be orderly, the State agency must meet at least the following requirements: a. the nature and severity of the facility's failure to meet required standards must be considered; b. the availability of suitable, alternative facilities must be considered; . . . ." [detailed specifications omitted].

manifested a similar general understanding: the Office of Human Development/ Administration on Aging issued a Technical Assistance Memorandum designed to aid state agencies having the "primary responsibility" for developing relocation plans for nursing home patients while the Public Health Service has indicated a similar view and has promulgated a Model State Relocation Plan for use by the states in planning for relocations.

Although as discussed below we think this regulatory background significant, we agree with the district court that it is insufficient by itself to impose a binding legal obligation on a state. The regulation serves only to establish conditions precedent to a state's ability to gain recompense from the federal

government if it decides to spend certain funds; it in no way mandates the expenditure of any funds. HEW's interpretations of that regulation, while perhaps suggesting a different view, can only clarify and cannot alter or expand the scope of those preconditions. Finally, the other HEW guidelines do not purport to do anything other than offer informal assistance, and are clearly of no binding force on the states.

In light of this conclusion, we think this dispute must be viewed primarily as a contractual problem. Our task in such matters is one of resolving the obviously unanticipated problem that has arisen in a way that effectuates the parties' contractual intent, see 3 Corbin, Contracts § 534 (1960), or, if it is clear that the parties had no meaningful intent as

to the matter, as one of construing their dealings so as to give them the most appropriate legal effect, see Corbin, supra, § 622.[3/] Put another

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3/ [Petitioners' Note: Footnote 3, as modified by the court on July 13, 1981, states as follows:]

3. We think it clear that we have jurisdiction over these state law claims as claims properly pendent to the substantial federal claims we have rejected. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966). In addition, we agree that the relief ordered by the district court is not barred by the Eleventh Amendment. We need not decide whether a federal court could restrain state officials solely under a pendent state law claim, for we conclude that the state has waived its rights under that amendment by having the case removed to federal court. While the standard for finding a waiver is high, see Edelman v. Jordan, 415 U.S. 651, 673 (1974), one long-accepted basis for such a finding is a general appearance in a federal proceeding by a state official acting within his authority. See Clark v. Barnard, 108 U.S. 436, 447 (1883); Ford Motor Co. v. Department of Treasury of Indiana, 323

(footnote continued)

(footnote continued)

U.S. 459, 467-70 (1945); Sosna v. Iowa, 419 U.S. 393, 396 n. 2 (1975). The state's actions here--seeking removal, arguing in opposition to plaintiff that the Eleventh Amendment did not bar federal jurisdiction over either the case as a whole or pendent claims in particular, see 28 U.S.C. § 1441(c), and pressing a counterclaim in federal court--present a far clearer case of waiver than does a mere appearance. The state Attorney General has necessarily represented that he has such power by having this case removed, and we have found nothing in our review of Massachusetts law to contradict this view. See Board of Educ. v. Assessors of Worcester, 368 Mass. 511, 515 (1975). The Attorney General has broad power to direct state litigation in all forums, see Mass. Gen. L. ch. 12 § 3, ch. 258 §6; Feeney v. Commonwealth, 373 Mass. 359, 366 N.E.2d 1262 (1977); Secretary of Administration v. Attorney General, 367 Mass. 154, 162-65 (1975), and has all powers reasonably necessary or incidental to his office, see Multi-Line Ins. Rating Bureau v. Commission of Ins., 357 Mass. 19, 22 (1970); [1975] Mass. Att'y Gen'l Rep. 40 (Op. N. 1, July 2, 1974). In light of the several factors cited above, its attempt now to invoke the Eleventh Amendment would if allowed work a virtual fraud on the federal court and opposing litigants. Eisler v.

(footnote continued)

(footnote continued)

Stritzler, 535 F.2d 148, 151-52 (1st Cir. 1976), involving non-conferrable jurisdiction rather than waivable immunity, sanctions no such abuse, and we will not do so now.

[Petitioners' Note: Footnote 3, as it appeared in the First Circuit's opinion dated June 4, 1981, stated as follows:]

3. Neither party has questioned our jurisdiction over these issues, which present essentially state law claims, and we think it clear that we have jurisdiction over them as claims properly pendent to the federal claim before us. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966). In addition, we agree that the relief ordered by the district court is not barred by the Eleventh Amendment. The state recognizes that a federal court may issue prospective interlocutory relief requiring the expenditure of state funds where such an order is necessary to restrain a state officer from acting illegally. See Edelman v. Jordan, 415 U.S. 651, 663-67 (1974); Ex Parte Young, 209 U.S. 123 (1908); Kimble v. Solomon, 599 F.2d 599 (4th Cir.), cert. denied, 444 U.S. 950 (1979). The state's argument that this exception is inapplicable where a plaintiff is ultimately unsuccessful on the merits is

(footnote continued)

way, we look here first to the intended terms of what we discern as an actual implied-in-fact contract between the parties and then to the terms imposed in any event by the constructive quasi-contract implied in law between them. We address each of these in turn.

In supplying a term omitted from the implied actual contract, our focus must be on what it is likely that the parties would have agreed upon had they focused on the problem. As a result, while we have rejected the argument that federal law directly obligates a state to pay the relevant costs, we think the provisions described above must be considered

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(footnote continued)

rendered unavailing by our conclusion that Newfield House is entitled to prevail on its claim.

relevant as a backdrop against which the parties' contractual expectations are to be assessed. Specifically, we think that those provisions serve to create a presumption or expectation that a state will pay for patient care during relocation efforts following a voluntary withdrawal, putting a burden on it to make clear, by law or contract, any extent to which contracting facilities would be liable for such expenses instead.[4/] Such a burden, of course, might be thought to rest on the state by operation of general contract principles even in the absence of

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4/ We think it clear, despite the state's half-hearted assertions to the contrary, that nothing in the federal Medicaid scheme prohibited payments of the kind made here, and equally clear that a state may contractually obligate itself for care for which it will receive no federal participation.

this regulatory background, since in such contractual dealings the state will be the party that both furnishes the standard agreement and that possesses greater general experience with the relevant conditions. But these federal provisions put the state on direct notice tht it would likely be presumed liable for the kind of costs involved here unless it took affirmative steps to dispel that presumption.5/

We find, however, that Massachusetts not only took no such affirmative liability-disclaiming steps, but in addition

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5/ It is conceded that the state had no plan specifically providing for the relocation of Medicaid patients following a provider's voluntary withdrawal from the program at the time this case arose, and it is also agreed that it does have such a plan now, placing unspecified relocation responsibilities on the facility.

took several steps in its role as contractor that reinforced the suggestion that it would pay such costs. First, DPW relocated patients if a facility was terminated from the Medicaid program because of inadequate patient care,[6/] and reimbursed facilities for care of patients who remained at a home pending transfer after a decertification. Similarly, it had written to Newfield House specifically, just before the events relevant to this case began, asserting that it would remove the home's Medicaid patients if applicable safety regulations

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6/ A state official testified that the instant case is the first instance of a home voluntarily withdrawing from the Medicaid program in this manner; the state's answer to a query by the district court indicated that there had been one prior such withdrawal, and that the state had provided only "gratuitous assistance".

were not met. See Klein v. Califano, 586 F.2d 250, 257 (3d Cir. 1978) (dictum) (state Medicaid agency required to transfer residents upon decertification of nursing home). Second, the state had provided assistance to Newfield House in relocating patients, by paying their transportation expenses, contacting other facilities to seek notification of vacancies and priority admissions, and providing other forms of what it characterizes as "gratuitous assistance".7/ Third, the department acknowledged that it would

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7/ DPW acknowledged that the state had a significant policy interest in reducing the "transfer trauma" suffered by many nursing home residents upon relocation. Similarly, in a newspaper article submitted as an exhibit at trial, the state's secretary of human services was quoted as stating that the state had a practical if not a legal responsibility

(footnote continued)

pay the full cost of patient care after a patient's own resources had expired. Fourth, the state appeared to acknowledge that it would be required to assist a facility that was withdrawing if that facility had signed a written provider agreement, although it later denied that suggestion. Fifth, DPW had a policy of requiring facilities to get the prior conseet [sic] of a patient and the patient's family to a transfer, and did not anticipate that Newfield House would move any patients without such consent; given many patients' predictable reluc-

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(footnote continued)

to provide relocation of Medicaid patients. Data provided by "relocation teams" employed by the state for this purpose suggest that they assisted in non-jeopardy as well as jeopardy situations.

tance to move, and the shortage of alternative beds available, see n. 10 infra, this policy had the predictable effect of requiring homes to provide interim care for patients. Sixth, DPW has never disputed the fact that pursuant to the federal regulation cited above it was entitled to federal financial participation for at least the first 30 days of care provided by a facility subsequent to its withdrawal from Medicaid. Finally, in the face of all these indications, the state never informed nursing homes that they might be required to pay for care in such circumstances until after this controversy had arisen,[8/] and

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8/ DPW's standard-form Agreement With Intermediate Care Facilities, which includes Newfield House, provides that transfers shall take place in accordance

(footnote continued)

never informed any individual patients of either that possibility or even of the fact that Newfield House was withdrawing from the program.

Taking these actions in conjunction with the presumption created by the federal guidelines, we conclude that the contract between Massachusetts and Newfield House must be interpreted as requiring the state to continue to pay for

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(footnote continued)

with a chapter of a Medical Care Plan, which until amended in October 1976 (just after Newfield House brought this suit) provided that DPW would "remove and relocate" patients in cases where facilities had been sanctioned for violations. The Agreement goes on to state that finding suitable alternate placements "shall be the joint responsibility of the Department and the provider." It requires the facility in relevant part only to provide 30 days notice of withdrawal, (which one state witness testified was currently being changed to six months), and obliges the state to allow a parallel 30 days for patient transfer in the event of decertification.

care until the home's patients were relocated. At the same time, however, we emphasize the relative rarity of holding a state to be contractually bound to pay for services in an area of social programs so largely governed by statutes and regulations. Finding such an obligation necessarily requires an intensive fact-specific inquiry, and we infer one here only because we find the facts relevant to the contract so compelling. See generally Monmouth Medical Center v. State of New Jersey, 80 N.J. 299 (1979). We note as well that such an interpretation could well be countervailed by evidence of bad faith or unreasonable activity on the part of a provider, no evidence of which has been presented here.

In addition, we note that even were we not to find the express contract

between the parties applicable to this situation we think this case would be an appropriate instance for the application of such quasi-contractual doctrines as quantum meruit and unjust enrichment. See generally 5 Corbin, supra, §§ 1102-21; Fuller and Eisenberg, Basic Contract Law 70-72 (3d ed. 1972). Like the district court, we give significant weight to the fact that the state would "with minor exceptions" have been required to pay these patients' expenses in another home had they been transferred immediately upon Newfield House's withdrawal.[9/] In addition, we take note of the undisputed fact that Newfield House provided quality care throughout

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9/ The state's argument that this fact should be disregarded because federal financial participation in these payments may later be disallowed is addressed in Part IV of our opinion.

this period, and of the equally undisputed fact that its Mecicaid rates--even its private rates--were less than the Medicaid rates of other nearby nursing home providers. Moreoever, we think Newfield House has satisfied other elements of a recovery in quantum meruit: it has provided its services under circumstances which put the state on notice that it expected to be paid, see Sachs v. Continental Oil Co., 454 F. Supp. 614 (E.D. Pa. 1978), it has itself had a reasonable expectation of being paid, see Turner v. Unification Church, 473 F. Supp. 367 (D. R.I. 1978), aff'd mem., 602 F.2d 458 (1st Cir. 1979), and it has provided substantial good-faith performance of its obligations under the contract, Franchi Const. Co. v. Combined Ins. Co., 580

F.2d 1 (1st Cir. 1978).[10/] Cf. Ferber Co. v. Ondrick, 310 F.2d 462, 466 (1st

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10/ To the extent that equitable remedies require that a plaintiff not have "unclean hands" in any manner, we note that there is no suggestion in the record that Newfield House acted in any bad faith or dilatory fashion in withdrawing from the program or in attempting to relocate its residents. While one state official denied that there were no beds available to receive the patients, and another had no information, a third repeatedly acknowledged a shortage of beds. A Newfield House administrator testified that she expected the transfer to take 10-12 months, and Newfield House introduced evidence of diligent efforts to relocate. While the state's data on relocation times suggested that the time required here was longer than usual, this could well have been explained by an increasing shortage of beds. Indeed, insofar as providing adequate beds is a responsibility of the state--as an HEW administrator testified that it was--failure to provide adequate beds is another factor tilting the equitable balance toward state payment. The state defendants would find unreasonable conduct in Newfield House's refusal to accept the state's proferred limited interim provider agreement, while Newfield House finds the state's refusal of its counter-

(footnote continued)

Cir. 1962) (awarding quantum meruit recovery in private lawsuit involving similar factual elements).

Having concluded that Newfield House is entitled to payment for the services it has rendered the state, we must determine the rate at which those services should be recompensed. On a straightforward contract interpretation theory terms of the contract are simply extended to cover the period not provided for, and the rate of payment is simply extended as well. Quasi-contractual remedies would dictate the same amount of

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(footnote continued)

offer to provide services at its private patient rate unreasonable. We think these actions the least favorable aspect of the case for the home, but conclude that they are insufficient to relieve the state of its obligation to pay at the lower rate.

recovery: the reasonable value of the goods or services furnished on a theory of quantum meruit, and the amount of benefit gained by the recipient on a theory of restitution.[11/] See Fuller and Eisenberg, supra, at 70; Interform Co. v. Mitchell, 575 F.2d 1270 (9th Cir. 1978) (while quantum meruit focuses on value of goods or services and restitution focuses on value of benefit, generally the two will not differ); cf. Beaumont Birch Co. v. Najjar Industries, Inc., 477 F. Supp. 970, 974 n. 10

11/ Our conclusion that these alternative methods of calculation dovetail exactly makes it unnecessary for us to consider such occasionally troublesome issues as whether an established contract price sets an upper limit on quantum meruit recovery. See Constantino v. American S/T Achilles, 580 F.2d 121 (4th Cir. 1978); Dobbs, Remedies § 132 at 949 (1973).

(S.D.N.Y. 1979) (contract price may be used as evidence of quantum meruit recovery even where plaintiff produced evidence showing actual value had been higher). Accordingly, we agree with the district court that the proper rate of payment should be Newfield House's prior Medicaid rate of $19.70 per day.12/ See generally Kaye v. Whalen, 56 A.2d 111 (3d Dept. 1977), aff'd mem, 44

12/ We think Newfield House's argument that the state's failure to secure an injunction bond from it precludes recovery of monies paid pursuant to the injunction to be specious. The state is clearly correct that the need for a bond is limited to the recovery of damages and has no application to a claim for restitution of amounts subsequently found to have been undue. Arkadelphia Milling Co. v. St. Louis S.W. Ry. Co., 294 U.S. 134 (1919); Middlewest Motor Freight Bureau v. United States, 433 F.2d 212 (8th Cir. 1979), cert. denied, 402 U.S. 999 (1971).

N.Y.2d 754, app. dismissed for want of a substantial federal question, 439 U.S. 972 (1978).

III

While our holdings above have disposed of the central issues in this case, we must also resolve Newfield House's claims that both the federal government and the home's Medicaid patients should have been added to this action as third-party defendants.[13/] We think the district court's dismissal of each of these claims to be correct. With respect to the federal government, we do

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13/ Our conclusion that Newfield House is entitled to payment by the state at the full rate of the state's prior payments makes it unnecessary for us to consider the home's claim that it was entitled to notice and a hearing prior to the state's termination of payments.

not reach the merits of its underlying contention that it is not required to reimburse the state for the payments made to Newfield House; we simply agree that Newfield House, being entitled to payment by the state, had no direct claims against the federal government, and, like the district court, we refer the state initially to its administrative recourse against the federal government.[14/] See

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14/ The record is somewhat unclear as to the current status of federal payments to the state. It appears that the federal government has continued to make all payments claimed by the state, while simultaneously expressing an intent to seek subsequent disallowance of the payments at issue here. The central issue appears to be whether the state could become eligible for federal financial participation in its payments to Newfield House by executing a "retroactive provider agreement"; while Newfield House

(footnote continued)

42 U.S.C. § 1316(d); 42 C.F.R. § 442.30(c). With respect to the patients, we think Newfield House's claim foreclosed by our finding that the terms of its contract with the state simply extended to the period in question, particularly in light of the home's failure to take any steps to dispel that expectation in advance of the events at issue here. One of those terms was obviously that Newfield House would seek no additional payment from Medicaid-funded

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(footnote continued)

and the state are agreeable to this resolution, the federal government thus far is not. We do not regard earlier expressions of the federal government's views in this matter as conclusive, in part because they have not been based on full administrative proceedings and in part because they have preceded the district court's and our finding that a constructive provider agreement did exist during the relevant period.

patients, and we think it bound by that provision during this period fully as much as the state is bound by its contractual commitments.

Affirmed.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NEWFIELD HOUSE, INC.,	)	
	)	
Plaintiff,	)	
	)	C.A. No.
-vs-	)	76-3742-G
	)	
MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE, et al.,	)	
	)	
Defendants.	)	

Before: Hon. W. Arthur Garrity Jr.,
District Judge.

Court Room No. 5
Federal Building
Boston, Massachusetts
March 3, 1980

Appearances:

Behar & Kalman, Esqs., by
Kenneth A. Behar, Esq.,
for the plaintiff.

Attorney Catherine A. White,
Assistant Attorney General,
for the defendants.

Eugenie H. Fitzhugh
Official Court Reporter
United States District Court
Boston, Massachusetts 02109
Tel. 426-3723

EXCERPT OF PROCEEDINGS

THE CLERK: Civil Action 76-3742-G, Newfield House versus the Mass. Department of Public Welfare.

* * * * * * *

[Recess.]

AFTER RECESS

THE COURT: Well, I apologize for taking exactly twice as long as I thought I would in the afternoon recess. The reason for my taking this time is because I will state the Court's rulings now rather than take the matter under advisement. I will state the decisions, and then the reasons for the decisions.

On these various motions, well, the first is granted, that is, to substitute the defendants. That is a motion that is the least controversial of them all.

On the revised third motion to vacate the judgment dismissing the federal defendants, that is denied; and on the plaintiff's motion for summary judgment, that is also denied, as is the plaintiff's motion for entry of a procedural order.

Turning to the defendants' motions, the motion of the defendants for summary judgment on the counterclaim is denied except to the extent of that difference of $8,538.74 between the daily rate of $32 per day -- I am sorry, it is not $32 -- $25 per day, which was paid, and the amount less by $8,538.74 which should have been paid under General Law Chapter 6A, Section 32. The defendants' motion for leave to file a third-party complaint is also denied.

Now for the reasons, and findings and conclusions on which the Court's orders rest.

The denial of the plaintiff's motion or motions hinges upon what the Court believes is a distinction of considerable importance, to which the parties, or at least the plaintiffs, do not attach much significance, and that is the difference between voluntary and involuntary termination of the agreement between the provider and the governmental agencies.

It rests on the nature of the whole welfare scheme, in my understanding. It reflects the principle of federalism that is so deep in this welfare payments area. The obligation to provide this welfare assistance comes from the state, and the plans are formulated by the state, and the role of the federal

government is more of a purely reimbursement nature in this area than probably any of these other federal programs where they have a sharing of the funding between the state and federal governments.

That is what the Court meant back in 1977, if that is when it was, when I evidently said that once the provider agreement terminated, the rights of the patients were terminated. I meant the rights of the patients vis-a-vis the federal government. I don't think I meant the rights of the patients with respect to the state government or with respect to the nursing homes.

Getting back to this distinction, which I mentioned in the procedural order dated October 26, 1979, the obligation of the state to help out in the relocation of patients when there is an

involuntary termination of the provider agreement is based, I believe, on the predicament in which the patients find themselves when you have an involuntary termination. There is more or less by definition an imminent threat to the health or perhaps safety, certainly welfare, of the patients.

Here, there was, under the program, a nursing facility certified by the government as being a place where the patients could go and get cared for, and then there developed conditions which required the decertification of it. It is as if the government vouched for the place, and the patients go to the place in reliance on the government's having certified it, and due to no fault of their own, the patients find themselves in a situation where the facility is

decertified and they have to move, or they have to be moved.

Under those situations, the government and the regulations do not look for assistance in relocating the patients to the operators of the facility which has been decertified. They have more or less by hypothesis proved themselves incapable or unwilling to care adequately for these patients, so the regulations call for, you might say, an affirmative reaction and response by the state. It is as if the state, under the situation of an involuntary termination or decertification, is trying to make amends to the patients for the predicament which it feels it was at least partly responsible for.

You do not have that same situation when a voluntary termination of the agreement by the provider occurs. There

is again by hypothesis no imminent threat to the safety and welfare of the patients; they are in an adequate facility; they are being cared for; and the state's withholding of assistance in the relocation of patients under such circumstances operates as a sort of disciplinary force in keeping the providers in compliance with their agreements.

I think in other words, that there is a very definite distinction to be drawn between the two situations, the decertification on the one hand and the situation which we have in this case, which involved a voluntary termination, and in that regard, I just note in passing that in response to the Court's procedural order of August 31, 1979, in which the Court asked whether there had been any voluntary withdrawals and what was done in that circumstance, the an-

swer that was filed by the defendants was that there had been only one instance that they knew about in addition to Newfield, and in that instance, there was implementation of the general policy that relocation was the responsibility of the facility and the patient and his family, although it says the department would provide assistance in locating other placements. That would be, of course, short of coming up with any money.

An additional reason for the Court's granting the defendants' motion for summary judgment on the plaintiff's claim and correspondingly denying the plaintiff's motion to reopen the cases against the federal defendants is what I have been calling the new regulations, new even though they were promulgated in 1978. They are found at 106 C.M.R. Sec-

tions 456.401-456.405. These are the regulations that now place on the state the burden of relocating patients when they are in a facility in which the provider agreement is terminated voluntarily by the provider.

It seems to me that those new regulations deserve more attention -- I perhaps should put it this way -- command more significance than has been attached to them by the parties. The point of enacting the new regulations that I draw from their enactment is that it was recognized that there was a gap in the previous regulations. Previous to the enactment of the new ones, there was no obligation on the state, is the inference which I draw from the new enactment.

I recognize that it is possible to infer too much from correcting deficiencies in regulations, just as there is in

correcting deficiencies in stairways when a step gives loose and someone falls through the stairs and injures himself, and you cannot admit into evidence the fact of repairs of that stairway to show liability.

It is a different situation, however. The repair of the staircase in the tort case is not refused admission in a tort case because of irrelevancy but because of the public policy grounds; you don't want to deter people from repairing staircases just because of a tort accident. In fact, there is a policy in favor of repairing a staircase after someone falls through.

So here, I think the enactment of the new regulations in 1978 is relevant, and there is no policy consideration comparable to the one which I referred

to, which is quite familiar to the law of torts.

The Court's ultimate point in this connection is that it finds support for its anaylsis that the state was under no obligation to act in this circumstance from the enactment of the regulations dated 1978, which it seems to me imposed the obligation on the state for the first time.

Plaintiff's counsel in his argument placed considerable emphasis on the failure to give these patients notice. There again, the distinction between decertification and voluntary termination I think is signficant. It seeks the input of patients into the decision whether a facility should be terminated. It gives the patients an opportunity, when a question arises about the accessibility of a fire escape or proper seasoning

in the food or proper heat coming out of the boiler, to state their version of the facts and bring them to the attention of the authorities.

Notice to them in a situation involving voluntary termination I think is a completely different matter. Moreover, if my memory serves me correctly, in this particular case, there was notice given by the plaintiff itself of some sort -- I don't know just what the formality of it was -- to the patients, one of whom I think became a private patient and remained in the plaintiff nursing home. Another one I gather transferred to a different home.

Turning now to the denial of the defendants' motion for summary judgment, except to the extent of the difference of $8,538 previously explained, the critical finding of the Court in this regard

is that the state would have been obliged to pay for the care of these patients somewhere had they been moved to another facility, because they did not have the means to become private patients, with minor exceptions.

The Court concludes that the unusual circumstances here presented -- and I efer to the injunction in the state court ordered by the Superior Court judge and then continued by order of the Federal Court, and the doubt as to what the obligation of the parties was in the circumstances, and the lack of any damage to the state except to the extent of the differential in rates already referred to -- support a conclusion that there was, during the pendency of the dispute as to the rights of the parties, what I call, for lack of a better term, a constructive provider agreement be-

tween the plaintiff and the state defendant.

Here, as I say, there was well-founded doubt on the part of all parties as to what the obligations of each of them were. There was, furthermore, reliance by all of the parties on the court orders, which, let no one doubt, were motivated primarily by the determination of the courts, state and federal, not to put senile, frail, elderly patients out on the sidewalk.

The continuing concern here has been to provide for the patients, and this, by the way, I don't mean is only in a legal sense. The Court recognizes that the plaintiff's agents here and the plaintiff itself treated the patients with kindness and concern.

Where there is or has been no damage to the state except the differential

of rates, because this money would have to have been paid out had the patients been able to be transferred to some other facility, there is, in my view, an equitable defense to the counterclaim which is urged by the state defendants against the plaintiff to the extent of the sum of money that the defendants were obligated to pay, if not to the plaintiff here, to some substitute facility.

Now there are obstacles to the Court's reaching this conclusion. One of them is the Eleventh Amendment. However, as indicated in oral argument and the colloquy that the Court had with counsel, the Eleventh Amendment does not prohibit the imposition on a state to make prospective payments, and in this situation, the payments that have been made by the state were all subsequent to valid court orders.

The ultimate decision on the merits of the case does not necessarily invalidate the preliminary injunctions ordered in the state court and reaffirmed in this session of the federal court. In my opinion, the orders requiring payment were valid for reasons that I have already stated: to keep the patients off the streets, that is to say, to keep them cared for; to allow sufficient time for very complex legal questions to be resolved; and to achieve the other goals heretofore stated, so that these payments, in my view, were in no way prohibited by the Eleventh Amendment.

Another reason which I believe supports the Court's ultimate conclusions in this matter is that imposition of liability for payment by the plaintiff to the state defendants on the counterclaim would, in all likelihood, support a claim

by the plaintiff against the patients and the estates of the patients which have been joined as parties defendant in this proceeding.

The Court in this case, for reasons stated in its memorandum and procedural order entered October 26, 1979, is seeking the end of the litigation, not the beginning of litigation against the estates of several patients, some of which have probably already been closed and others in which there were little if any funds. The Court does not consider that its denial of the defendants' counterclaim presents any windfall to the plaintiff. As I say, and have endeavored to explain, there was, as a practical matter, a forced continuation of the relationship between the plaintiff and its patients, and the Court has imposed

a provider agreement relationship on the parties in this situation.

Please bear with me for a moment while I check my notes, because I may have wanted to address some other principal contention of the state defendants.

[Pause.]

I do wish to allude to the availability to the state defendants of administrative remedies whereby the state may succeed in obtaining reimbursement from the federal government of half of the amount, totaling approximately $44,766.57, which the court orders result in having been properly paid by the state to the plaintiff. The Court is aware of state defense counsel's point that these administrative remedies may be futile. The word "futile" is emphasized by counsel, but the word "may" is emphasized by the Court.

The Court has observed enough over the last several years of the relationship between state and municipal governments and the federal government in Washington to know that sometimes an administrative phone call accomplishes what a whole series of court orders cannot accomplish. To this point, there has not been withholding of federal reimbursement from the state, and I am not nearly so pessimistic about the prospects of the state's getting reimbursement from the federal government under the special circumstances of this case as are defense counsel.

There is no legal right, however, at least at this point, for recoupment by the state from the federal government, and for that and other reasons that I have already stated, the Court also

denies the state defendants' motion for leave to file a third-party complaint.

I have not said it quite explicitly, but meant to, and have come close, the concept of unjust enrichment here does not in my view apply in favor of the state defendants against the plaintiff on the state defendants' counterclaim. Conversely, it applies to the plaintiff's defense against the state defendants' counterclaim. Were the counterclaim to prevail, in my view there would be unjust enrichment by the state defendants at the expense of the plaintiffs.

I would like to ask Mr. Smith to come up here for a moment, because I may have overlooked a point that we discussed in the lobby.

[Pause.]

Well, I will stop at that point. It is obvious that this afternoon was the day for the denial of motions rather than for their being granted. Today was a negative day, at least in this case.

I will conclude by citing again the considerations spelled out in the Court's memorandum and procedural order dated October 26, 1979. This is a case involving numerous refinements and subissues which the Court has not addressed. It is, on the other hand, I think, that rare case calling for an end to litigation on the most equitable terms that can be thought of consistently with the statutes and regulations.

The Court's thinking of a practical equitable solution in this case was inspired, if that is the right word, initially by the Monmouth Medical Center against State of New Jersey case that

was attached to the plaintiff's memorandum filed September 21, 1979. That was, of course, a different case, but it involved the payment of Medicare or Medicaid funds under circumstances not covered by, and indeed arguably contrary to, the regulations, but in that case, Judge Passman for the court, in a decision on June 18, 1979, at page 17, explicitly selected and adopted what he said was an equitable solution, and this case I think is analogous.

That concludes the statement, and we will please recess.

MISS WHITE: Your Honor, may I just---

THE COURT: Of course, Miss White.

MISS WHITE: At the outset of your decision, when you were listing actions on particular motions, you did not mention the government's motion for summary

judgment, although I think you intended to, on the merits.

THE COURT: I did intend to. I will write up all these endoresements. The defendants' motion for summary judgment is denied.

MISS WHITE: The---

THE COURT: On your counterclaim. I am sorry. On the---

MISS WHITE: ---motion for summary judgment

THE COURT: On the motion with respect to plaintiff's summary judgment, it is granted.

MISS WHITE: Thank you, your Honor.

THE COURT: All right.

[Thereupon the hearing was concluded.]

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1541.

MASSACHUSETTS DEPARTMENT OF
PUBLIC WELFARE, ET AL.,
Plaintiffs, Appellants,

v.

NEWFIELD HOUSE, INC., ET AL.,
Defendants, Appellees.

No. 80-1554.

MASSACHUSETTS DEPARTMENT OF
PUBLIC WELFARE, ET AL.,
Plaintiffs, Appellees,

v.

NEWFIELD HOUSE, INC.,
Defendant, Appellant,
and
CLARA CARAMELLO, ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: June 4, 1981

These causes came on to be heard on appeals from the United States District

Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here orderd, adjudged, and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ DANA H. GALLUP

Clerk.

[cc: Mss. Yogman, Grace, and Mr. Behar]

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 80-1541
80-1554

NEWFIELD HOUSE, INC.,
Plaintiff, Appellant,

v.

MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE, et al.,
Defendants, Appellees.

ON PETITION FOR REHEARING

Entered: July 13, 1981

Before Coffin, Chief Judge,
Winter, Circuit Judge,*/
Skinner, District Judge**/

The Petition for Rehearing is denied. The court's opinion dated June

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*/ Of the Fourth Circuit, sitting by designation.

**/ Of the District of Massachusetts, sitting by designation.

4, 1981 is modified by substituting the following version of footnote 3:

3. We think it clear that we have jurisdiction over these state law claims as claims properly pendent to the substantial federal claims we have rejected. See United Mine Workers v. Gibbs, 383 U.S. 715 (1966). In addition, we agree that the relief ordered by the district court is not barred by the Eleventh Amendment. We need not decide whether a federal court could restrain state officials solely under a pendent state law claim, for we conclude that the state has waived its rights under that amendment by having the case removed to federal court. While the standard for finding a waiver is high, see Edelman v. Jordan, 415 U.S. 651, 673 (1974), one long-accepted basis for such a finding is a general appearance in a federal proceeding by a state official acting within his authority. See Clark v. Barnard, 108 U.S. 436, 447 (1883); Ford Motor Co. v. Department of Treasury of Indiana, 323 U.S. 459, 467-70 (1945); Sosna v. Iowa, 419 U.S. 393, 396 n. 2 (1975). The state's actions here--seeking removal, arguing in opposition to plaintiff that the Eleventh Amendment did not bar federal jurisdiction over either the case as a whole or pendent claims in particular, see 28 U.S.C. § 1441(c), and pressing a counterclaim in federal court --present a far clearer case of waiver than does a mere appearance. The state Attorney General has necessarily represented that he has such power by having this case removed, and

we have found nothing in our review of Massachusetts law to contradict this view. See Board of Educ. v. Assessors of Worcester, 368 Mass. 511, 515 (1975). The Attorney General has broad power to direct state litigation in all forums, see Mass. Gen. L. ch. 12 § 3, ch. 258 §6; Feeney v. Commonwealth, 373 Mass. 359, 366 N.E.2d 1262 (1977); Secretary of Administration v. Attorney General, 367 Mass. 154, 162-65 (1975), and has all powers reasonably necessary or incidental to his office, see Multi-Line Ins. Rating Bureau v. Commission of Ins., 357 Mass. 19, 22 (1970); [1975] Mass. Att'y Gen'l Rep. 40 (Op. N. 1, July 2, 1974). In light of the several factors cited above, its attempt now to invoke the Eleventh Amendment would if allowed work a virtual fraud on the federal court and opposing litigants. Eisler v. Stritzler, 535 F.2d 148, 151-52 (1st Cir. 1976), involving non-conferrable jurisdiction rather than waivable immunity, sanctions no such abuse, and we will not do so now.

By the Court,

DANA H. GALLUP,

Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1541.

MASSACHUSETTS DEPARTMENT OF
PUBLIC WELFARE, ET AL.,
Plaintiffs, Appellants,

v.

NEWFIELD HOUSE, INC., ET AL.,
Defendants, Appellees.

MASSACHUSETTS DEPARTMENT OF
PUBLIC WELFARE, ET AL.,
Plaintiffs, Appellees,

v.

NEWFIELD HOUSE, INC.,
Defendant, Appellant,
and
CLARA CARAMELLO, ET AL.,
Defendants, Appellees.

ORDER OF COURT

Entered: July 13, 1981

The panel of judges that rendered the decision in these cases having denied the petition for rehearing, and no judge who was a member of the panel

nor any judge in regular active service having requested a vote on the suggestion for rehearing en banc,

It is ordered that the suggestion for rehearing en banc is hereby denied.

Upon consideration of the State Defendants' "Objection to Bill of Costs,"

It is ordered that the proposed taxation of costs dated June 19, 1981 be amended to tax costs in favor of Newfield House, Inc. in the amount of $2,422.94.

By the Court:

DANA H. GALLUP, Clerk.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Constitution of the United States

Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Constitution of Massachusetts, Declaration of Rights

Article XXX

In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the executive and judicial powers, or either of

them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

28 U.S.C. § 1441(a)

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

Massachusetts General Laws Ann.

ch. 12, § 3

The attorney general shall appear for the commonwealth and for state departments, officers and commissions in

all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said departments, officers and commissions are called in question, in all the courts of the commonwealth, except upon criminal recongizances and bail bonds, and in suits and proceedings before any other tribunal, including the prosecution of claims of the commonwealth against the United States, when requested by the governor or by the general court or either branch thereof. All such suits and proceedings shall be prosecuted or defended by him or under his direction. Writs summonses or other processes served upon such officers shall be forthwith transmitted by them to him. All legal services required by such departments, officers, commissions and

commissioners of pilots for district one in matters relating to their official duties shall, except as otherwise provided, be rendered by the attorney general or under his direction.

ch. 212, § 3

The [superior] court shall have exclusive original jurisdiction . . . of claims against the commonwealth

ch. 258, § 2

. . . The remedies provided by this chapter shall be exlusive of any other civil action or proceeding by reason of the same subject matter against the public employer . . . .

Federal Rules of Civil Procedure

Rule 12(b)

How Presented. . . . No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. . . .

Rule 12(h)

Waiver or Preservation of Certain Defenses.

* * *

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Rule 13(a)

Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. . . .

Rule 18(a)

Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as he has against an opposing party.

Rule 82

Jurisdiction and Venue Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . .

Opposition

Office - Supreme Court, U.S.
FILED
NOV 17 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-816.

In the

Supreme Court of the United States.

OCTOBER TERM, 1981.

MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE, ET AL.,
PETITIONERS,

v.

NEWFIELD HOUSE, INC., ET AL.,
RESPONDENTS.

Brief of Respondent in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

KENNETH A. BEHAR,
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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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No. 81-816.

In the

Supreme Court of the United States.

OCTOBER TERM, 1981.

MASSACHUSETTS DEPARTMENT OF PUBLIC WELFARE, ET AL.,
PETITIONERS,

v.

NEWFIELD HOUSE, INC., ET AL.,
RESPONDENTS.

Brief of Respondent in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below.

The opinion of the United States District Court for the District of Massachusetts is unreported and is set forth in pages 40a-65a of the Appendix to the Petition for a Writ of Certiorari. The opinion of the United States Court of Appeals for the First Circuit is reported at 651 F.2d 32 (1st Cir. 1981) and is set forth in pages 1a-39a, 66a-68a of the Appendix to the Petition for a Writ of Certiorari.

Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on June 4, 1981. By order dated July

13, 1981, the Court of Appeals denied petitioners' petition for rehearing. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

Statutes Involved.

The relevant provisions of Amendment XI to the United States Constitution; 28 U.S.C. § 1441(a); Mass. G.L. c. 12, § 3; Fed.R.Civ.P. 13(a), are included in the Appendix to the petition.

The relevant provisions of 42 C.F.R. §§ 449.10(b)(15)(v), 449.33(a)(4), (6); Mass. G.L. c. 151B, § 4(10); Mass. G.L. c. 258, § 1, are included in the Appendix annexed hereto.

Prior Proceedings.

In response to written notification from the petitioner, the Massachusetts Department of Public Welfare (DPW), that payment of medical assistance benefits would be terminated for its Medicaid-eligible patients on September 30, 1976, the respondent, Newfield House, Inc. ("the Home"), brought suit in the Massachusetts Superior Court for Suffolk County seeking, among other things, to enjoin the DPW and that agency's chief executive officer, the petitioner, Commissioner of Public Welfare, from refusing either to pay for the patients' care or to relocate the patients to other facilities. The State Superior Court entered a temporary restraining order which was continued for fifteen days by agreement of the parties. The order enjoined the DPW, its Commissioner, and all persons acting in concert with them from refusing to pay for nursing home services rendered by the respondent to its Medicaid patients at less than the facility's $25 private patient per diem rate. After hearing, the Superior Court continued the restraining order in effect and directed that the case be assigned for trial on the merits on a first case out basis. The restraining order was con-

tinued in effect without bond. At no time did the petitioners request or seek a court order requiring the respondent to post a bond as a condition of obtaining injunctive relief. (See Appendix to Petition 6a, 35a n.12.)

On October 20, 1976, the petitioners removed the State Superior Court proceeding to the United States District Court for the District of Massachusetts. The respondent moved to remand the case to the state court in part on the ground that the Eleventh Amendment to the United States Constitution deprived the federal district court of jurisdiction over the case. The *petitioners* opposed remand arguing that the Eleventh Amendment was not a bar to federal court jurisdiction since, among other things, the relief afforded to the respondent was purely prospective. The district court denied the respondent's motion to remand. (Appendix to Petition 6a.)

During the pendency of the case before the district court, the petitioners moved to clarify the injunctive order. No action was ever taken on that motion. The petitioners also moved to dissolve the injunctive order. On August 31, 1979, the petitioners' motion to dissolve the restraining order was denied on the ground of mootness. (Appendix to Petition 7a.)

At various junctures in the litigation, the district court permitted the respondent to add the Secretary of Health, Education and Welfare (HEW),* the individual state officials constituting the Massachusetts Department of Public Health, and its Medicaid patients, as parties defendant in its action. (Appendix to Petition 7a.)

The petitioners counterclaimed against the respondent. The counterclaim did not refer to the Eleventh Amendment. Rather, the petitioners sought vacation of the restraining order and restitution of monies received by the respondent under that order. The restitution claim was premised upon the petitioners' assertion that "[the respondent] has benefitted unjust-

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* Now known as the Secretary of Health and Human Services.

ly from DPW's reimbursement payments made in compliance with the temporary restraining order . . ." (1st Cir. App. 269.) The respondent brought a third-party complaint against its Medicaid patients arising from the counterclaim brought against it by the petitioners. (Appendix to petition 7a.)

On June 17, 1980, acting on the petitioners' motion for summary judgment and the respondent's motion for partial summary judgment, the district court disposed of the various claims the respondent and the petitioners had brought against each other. Among other things, the court's judgment rejected the respondent's claim that the petitioners were required by federal law to relocate affected Medicaid patients in the circumstances of this case, rejected various constitutional claims advanced by the respondent on its own behalf and on behalf of its patients, denied the respondent any relief against its patients, and awarded the petitioners partial relief on their counterclaim. (Appendix to Petition 8a-10a.)

The petitioners appealed to the Court of Appeals for the First Circuit from the judgment of the district court. On that appeal, they did not challenge the propriety of the temporary restraining order originally entered by the State Superior Court. The petitioners claimed that they were entitled under their counterclaim to complete restitution of all monies that had been paid to the respondent for the care of Medicaid patients.

The respondent cross-appealed. The respondent sought review of ten distinct issues including the constitutional rights of it and its patients to a hearing, the constitutional and federal law rights of its patients to notice of the termination of their medical assistance payments, the obligations of the parties under federal law as to patient relocation responsibility, and the correctness of the district court's rejection of its claims against the patients.

The Court of Appeals for the First Circuit held that federal law did not require the petitioners to relocate patients or to pay for their care. (Appendix to Petition 11a-17a.) The court declined to decide any constitutional question, see, *e.g.*, Appendix to Petition 36a n.13, and instead affirmed the judgment of the district court by applying contract principles to determine the rights and obligations of the parties. (Appendix to Petition 17a-29a.) The court rejected the petitioners' claim to full restitution on the independent ground that the *petitioners* would be unjustly enriched by such an award. (Appendix to Petition 29a-33a.)

Statement of the Case.

The respondent is duly licensed by the Massachusetts Department of Public Health as a nursing home health care facility. It began participating in the Medicaid program as a provider of nursing home services with the inception of the program in Massachusetts. The petitioner, the DPW, administers Massachusetts' Medicaid program under the direction of its Commissioner, who is also a petitioner. (Appendix to Petition 3a-4a.)

Effective May 17, 1975, HEW directed the DPW to enter into contracts called provider agreements with nursing home Medicaid providers. Prior to that date, the respondent and other nursing home providers had participated in Medicaid in the absence of any written agreement. On May 30, 1975, the respondent informed the DPW that it would not participate as a Medicaid provider under the terms of the agreement proffered by the agency. An alternative provider agreement proposed by the respondent was rejected by the DPW. (Appendix to Petition 4a-5a.)

On August 24, 1976, the DPW informed the respondent that the agency would terminate payments to the Home of its patients' medical assistance benefits commencing October 1, 1976. During the period May 17, 1975 through September 30, 1976, as in prior years, the respondent received payments from the DPW for services rendered to Medicaid patients in the absence of a provider agreement.

The DPW did not give notice to any affected Medicaid patient that payments to the respondent of the patients' medical assistance benefits were being terminated. Nor did the DPW advise the Home's Medicaid patients that they would have to relocate or, if they chose to remain at the Home, personally assume the responsibility for payment for their care. (Appendix to Petition 27a-28a.)

At the time it terminated Medicaid payments to the respondent, the DPW provided what it called "gratuitous assistance" in patient relocation situations. However, the DPW made no efforts of any kind to transfer or relocate the respondent's Medicaid patients. (See Appendix to Petition 25a.) The DPW official who terminated Medicaid payments to the respondent knew that this measure was not in the best interests of the Home's Medicaid patients because he knew that the payments were necessary to protect the health and welfare of the patients, that the respondent provided excellent patient care, and that the relocation which would be necessitated by the payment termination would isolate some patients from family and friends. (1st Cir. App. 719-720, 683, 661-662.)

"Transfer trauma" is a term used to describe medical, psychological, and social problems that may result from a variety of situations including cases where an elderly patient is transferred from one nursing home to another. In anticipation of nursing home closings occasioned by the implementation of rigorous construction standards for facilities partici-

pating in Medicaid, the Surgeon General of the United States, in 1975, warned of adverse "transfer trauma" consequences to patients and suggested measures to be employed by state officials to minimize harm to patients. The Surgeon General suggested that appropriate state agencies develop psychosocial patient profiles, counsel patients and their families, and arrange for on-site visits to the transferee facility. (Appendix to Petition 16a.) At all times during which Medicaid patients were being cared for by the respondent, the "gratuitous assistance" provided by the DPW in patient relocation situations did not include any of the preventive measures enumerated by the Surgeon General. The DPW and Massachusetts Department of Public Health were aware that "transfer trauma" was a real problem in patient relocation situations. In fact, the DPW official who terminated payment of patients' medical assistance benefits to the respondent did so with the knowledge that Medicaid patients' interests would be adversely affected due to the problems associated with transfer trauma. The DPW first developed guidelines to address the problems and concerns of the Surgeon General after Medicaid patients no longer resided at the respondent. The guidelines were in part adopted because of an express finding by the agency "that a dramatic increase in mortality rates occurs when infirm persons relocate from one site to another." (1st Cir. App. 994.)

At all pertinent times it was the DPW's policy to have nursing homes obtain the consent of patients and relatives before relocating patients. The official who terminated payment of the medical assistance benefits of the respondent's Medicaid patients did not intend that the Home would relocate the patients without their prior consent and the prior consent of their families, since failure to obtain such consent would violate the patients' rights. (Appendix to Petition 26a.) The respondent complied with the DPW's patient consent policy and did not

relocate any Medicaid patient without his/her consent and the permission of the patient's family. In many instances, the Home's patients and/or family would not consent to transfers and the respondent respected such preferences in accordance with the DPW's patient consent policy.

At all pertinent times, the respondent made repeated and extensive efforts to achieve appropriate alternative placements for its Medicaid patients. For the most part, nursing homes in the Plymouth area, where the respondent was located, were unable and/or unwilling to accept the Home's Medicaid patients. At all times material to this case there was a statewide shortage of nursing home beds, and a particular scarcity of beds in the Plymouth area. This bed shortage was caused in significant part by the refusal of the officials comprising the Commonwealth's Department of Public Health, in administering the state's determination of need law, to permit additional nursing home beds to come into existence in Plymouth and elsewhere. The nursing home bed shortage in the Commonwealth has been so severe that on occasion Medicaid patients have been forced to suffer from inadequate patient care because the DPW could not relocate them from sub-standard facilities due to the lack of available beds. (See Appendix to Petition 32a n.10; 1st Cir. App. 198-199.)

As late as December 12, 1976, the DPW had never, in writing, advised any nursing home in the Commonwealth that withdrawal from Medicaid required a facility to relocate Medicaid patients. In March of 1975, the DPW, in writing, advised the respondent and other nursing home providers that the *DPW* would remove patients from any facility not meeting federal life safety code construction requirements. This representation to the respondent was false since the DPW refused to remove patients from facilities with life safety code deficiencies. (Appendix to Petition 24a, 26a, 27a.)

Prior to October 1, 1976, the respondent had been reimbursed for providing nursing services to Medicaid patients at the patient per diem rate of $19.70. By state court order, this reimbursement proceeded at the Home's private rate of $25.00 per patient day as of October 1, 1976. (Appendix to Petition 8a.) The Home's $25.00 private rate was reasonable by the DPW's own admission. In fact, the Medicaid rates of other Plymouth nursing homes are higher than the respondent's private patient rate. (Appendix to Petition 31a.) If one of the respondent's Medicaid patients had been relocated to another Plymouth nursing home facility, the DPW would have had to pay approximately $10 more per patient day than the DPW was paying the respondent. The DPW received fifty percent federal financial assistance for all payments made by it under the terms of the temporary restraining order. (1st Cir. App. 701-702, 1092.)

As of January 1, 1978, the respondent's ten Medicaid patients had relocated, had become private paying patients, or had deceased. One patient was transferred to a Plymouth facility where conditions were determined by the Department of Public Health to jeopardize patient health and welfare. Within twelve months after the transfer, this patient developed severe bed sores, became hospitalized, and died.

During 1977, the respondent sent bills to its Medicaid patients to cause them either to become private paying patients or, in the alternative, to relocate. The DPW's Plymouth office counselled patients' relatives not to pay such bills. The DPW central office advised one patient's relative that the patient's assuming payment as a private patient would result in a loss of Medicaid benefits without reinstatement. The Commissioner of Public Welfare, a petitioner herein, deposed that in response to inquiries from patients' families, the DPW advised the families that the Medicaid benefits of their patient-rela-

tives would not cease so long as the temporary restraining order was outstanding. (1st Cir. App. 439, 544-545, 228.)

In 1978, the DPW for the first time proposed and adopted regulations to provide for patient relocation when a facility terminated its Medicaid participation. Currently, the DPW requires nursing homes to provide six months' advance notice before terminating Medicaid participation. Also, current DPW regulations require a nursing home withdrawing from Medicaid to assume patient transfer responsibilities. At all times material to this case, no comparable regulatory provisions existed. (Appendix to Petition 3a, 11a-12a.)

Argument.

The Petition Presents No Substantial Question Warranting Further Review by this Court.

Stripped of its self-serving rhetoric that this case revolutionizes the rights of states within the jurisdiction of the Court of Appeals for the First Circuit, the petition for a writ of certiorari may be seen for what it is — a final attempt to deprive the respondent of its day in court and to rehabilitate a failed trial strategy. The Court of Appeals characterization of the petitioners' tactics as "a virtual fraud on the federal courts and opposing litigants" is, if anything, a euphemism. (Appendix to Petition 45a.)

The decision of the Court of Appeals is correct and presents no reason for further review in this Court. The petitioners' counterclaim sounding in restitution was within the ancillary jurisdiction of the courts below. Its resolution required a balancing of facts and equitable considerations unique to this case. The court's rejection of the petitioners' equitable resti-

tution claim is unexceptionable, and constitutes an independent ground for upholding the decision of the Court of Appeals which avoids all Eleventh Amendment issues advanced by the petitioners.

The court below had jurisdiction over state law claims raised in this case. The state law claims were pendent to substantial federal law claims raised by the respondent and to the respondent's various constitutional and federal statutory claims which the Court of Appeals, in exercising the favored approach of avoiding unnecessary resolution of constitutional questions, did not reach. Issues raised by the petitioners' counterclaim were within the ancillary jurisdiction of the courts below.

The Eleventh Amendment has no applicability to this case. The temporary restraining order issued by the State Superior Court afforded the respondent prospective injunctive relief against state officials consistent with uniform decisions of this Court. The petitioners never appealed the injunction order which issued in this case, and in written and oral argument in the courts below conceded that those courts had authority to order the injunctive relief afforded the respondent and that the exercise of that authority was not an abuse of discretion. The petitioners ultimate quarrel is with the decision of *Ex parte Young*, 209 U.S. 123 (1908), a decision which this Court has consistently affirmed. The petitioners' Eleventh Amendment claims are foreclosed by uniform decisional law that offensive invocation of that amendment, such as in pursuit of a counterclaim, is prohibited. Finally, the Court of Appeals correctly held that the petitioners waived their Eleventh Amendment immunity.

I. The Lower Courts' Disposition of this Case Does Not Conflict with this Court's Decision in Alabama v. Pugh.

The petitioners' assertion that the lower courts' judgments conflict with *Alabama* v. *Pugh*, 438 U.S. 781 (1978), is an insubstantial, makeweight argument. Individual state officials with administrative authority over the Massachusetts Departments of Public Welfare and Health were named defendants in the courts below. *Ex parte Young*, *supra*, and its progeny establish that the Eleventh Amendment does not bar prospective injunctive orders against state officials even when compliance with the orders requires the expenditure of state funds. *Edelman* v. *Jordan*, 415 U.S. 651, 664 (1974); *Quern* v. *Jordan*, 440 U.S. 332, 347-349 (1979).

The petitioners' Eleventh Amendment defense was raised solely on behalf of the defendant state agencies.[1] The petitioners never argued in the courts below that the Eleventh Amendment precluded the injunctive relief afforded to the respondent against state officials. Indeed, it was the *petitioners* who took the position in the district court that the presence of individual state officials as parties defendant and properly subject to the state court temporary restraining order made

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[1] The first affirmative defense of the petitioners stated:

> The court lacks subject matter jurisdiction of this action *to the extent* that relief is sought against the Department of Public Welfare and the Department of Public Health in that such relief is barred by the doctrine of sovereign immunity and the Eleventh Amendment to the Constitution of the United States.

(1st Cir. App. 265.) (Emphasis added.)

Eleventh Amendment issues concerning the defendant state agencies superfluous.[2]

The petitioners' argument based on *Alabama* v. *Pugh* is entirely "academic." *Alabama* v. *Pugh*, *supra* at 782. The petitioners motion to modify the state court restraining order was dismissed as moot and the petitioners did not (and have not) challenged that order. The possibility of the DPW being "held in contempt" at some time in the future is nonexistent. *Id.*

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[2] At pages 9-10 of "Defendants' Memorandum in Support of its [*sic*] Motion for a Protective Order and in Opposition to Plaintiff's Motions Relating to Discovery and to Plaintiff's Motion to Strike," the petitioners stated:

> Plaintiff misreads defendant's Motion to Dismiss. Defendants do not contend that this court has *no* jurisdiction over the instant action, but rather maintain only that the court has no jurisdiction over the defendant Department of Public Welfare because of the Eleventh Amendment to the United States Constitution and the doctrine of sovereign immunity. Therefore, defendants [*sic*] claim that the action should be dismissed against DPW on jurisdictional grounds. Defendants' motion to dismiss the *entire action* is based upon Fed. R. Civ. P. 12b(6) only.
>
> In moving for dismissal against defendant DPW on the basis of its immunity to suit, defendants have implicitly conceded that the court has jurisdiction over defendant Sharp [the then Commissioner of Public Welfare] and, therefore, over plaintiff's action. This court has also recognized that original federal jurisdiction exists over defendant Sharp, sued in his capacity as a state official, by denying plaintiff's motion to remand.

(The First Circuit Appendix erroneously included only pages 1-4 of the petitioners' memorandum.) The respondent recognizes that *Edelman* v. *Jordan*, *supra*, sanctions the raising of jurisdictional issues before this Court even though the issues were not raised in the courts below. *Id.* at 678. However, in support of its characterization of the petitioners' first jurisdictional issue as a makeweight, the respondent notes that the petitioners never cited *Alabama* v. *Pugh* in their brief to the Court of Appeals.

II. The Lower Courts had Jurisdiction Over the Respondent's State Law Claims.

A. *Pendent Jurisdiction.*

United Mine Workers v. *Gibbs*, 383 U.S. 715, 725 (1966) holds that a federal court has the *power* to resolve state law claims if they are joined with noninsubstantial federal claims and the federal law and state law claims arise out of a "common nucleous of operative fact." Both requirements are met here. The petitioners' decision to terminate patients' Medicaid benefits at the respondent's facility gave rise to the constitutional, federal law, and state law claims raised by the respondent. The Court of Appeals determined that *one* of the respondent's federal law claims was substantial within the *Gibbs* rule.[3] (Appendix to Petition 20a, 67a.) In view of that holding, it was unnecessary for the court to address whether the respondent's other federal law and constitutional claims were also substantial within the meaning of that rule.[4]

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[3] The Court of Appeals expressly declined to reach the constitutional claims brought by the respondent on its own behalf. (Appendix to Petition 36a n.13.) Those claims have express decisional support. *Ross* v. *State of Wisconsin Dept. of Health and Social Services*, 369 F. Supp. 570, 572 (E.D. Wisc. 1973); *Hathaway* v. *Mathews*, 546 F.2d 227, 230 (7th Cir. 1976).

[4] Upon the failure of the district court to appoint a *guardian ad litem* for its patients, Appendix to Petition 7a, the respondent advanced federal law and constitutional claims on their behalf. The petitioners never *notified* the patients that their Medicaid benefits were to be terminated. (Appendix to Petition 28a.) The respondent argued that this failure to notify violated the patients' rights under federal law and deprived them of due process. See, *e.g.*, *Eder* v. *Beal*, 609 F.2d 695, 699-700 (3rd Cir. 1979); *Velazco* v. *Minter*, 481 F.2d 573, 576 (1st Cir. 1973). The patients' right to a *hearing* prior to termination of their benefits was also advanced by the respondent. On the facts of this case, *O'Bannon* v. *Town Court Nursing Center*, 447 U.S. 773 (1980) does not control. *O'Bannon* did not address patients' right to prior *notice* of benefit terminations. On the question of *hearing* rights, *O'Bannon* does not

Cases cited by the petitioners are consistent with the exercise of pendent jurisdiction by the courts below. *Missouri* v. *Fiske*, 290 U.S. 18 (1933) did not, as petitioners intimate, involve ancillary jurisdiction as that term has come to be used in connection with such pleadings as counterclaims. Rather, that case involved an independent action which purported to be supplemental to an earlier federal court case. Fiske brought the supplemental bill to enjoin an on-going state court proceeding brought by Missouri. This Court held that the Eleventh Amendment precluded the supplemental bill which involved no independent federal claims. Fiske, of course, was free to litigate all defenses, including those grounded in the earlier federal court case, in defending the state proceeding.

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preclude the respondent's claims because affected patients possessed property and liberty interests sufficient to trigger constitutionally mandated procedural safeguards. Those rights, given definition by the unique facts of this case, have independent sources. First, they are grounded in Massachusetts' policy entitling patients and their families to give prior consent to transfers from nursing homes. (Appendix to Petition 26a.) Compare *O'Bannon*, *supra* at 785 n.17. Second, federal guidelines require *state agencies* to assess each patient's medical and psychological needs prior to relocation, as well as the suitability of the transferee facility. The guidelines, reported in CCH Medicare-Medicaid Guide (1979-2 Transfer Binder) ¶ 30,142, emerged from regulations not considered by this court in *O'Bannon*, 42 C.F.R. §§ 449.10 (b)(15)(v) (1977), 449.33(a)(4), (6) (1977) and from a consent decree of nation-wide applicability interpreting those regulations which was entered in the case of *Cornell* v. *Creasy*, Civ. Action No. C77-434 (N.D. Ohio 1978). (Appendix to Petition 14a-15a.) Patients' liberty interests were implicated by the facts on transfer trauma established in this case, *Rockhill Care Center, Inc.* v. *Harris*, 502 F. Supp. 1227 (W.D. Mo. 1980), and by the undisputed fact that not all "certified" facilities are fungible since Massachusetts permits facilities to remain in Medicaid although they provide substandard care. (Appendix to Petition 24a.) Finally, the respondent raised various constitutional claims arising from the physical impossibility of relocating the patients due to a nursing home bed shortage caused by the petitioners, Appendix to Petition 32a n.10, and from the obligation imposed on the respondent by state law to care for the patients. Mass. G.L. c. 151B, § 4(10).

In *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978), Kroger brought a wrongful death action against a third party. The third party impleaded Owen Equipment. Kroger then brought an unrelated claim against Owen Equipment. There existed diversity jurisdiction as to Kroger and the third party, but not as to Kroger and Owen Equipment. This Court held that when the third party obtained summary judgment as to Kroger, Kroger's claim against Owen Equipment should have been dismissed for lack of diversity. The Court distinguished *Gibbs*, which, like the instant case, involved federal and state claims against a *common* defendant. *Id.* at 370. The *Kroger* case is further inapposite to the present case because (1) *Kroger* chose to bring a non-federal claim in federal court, and (2) Kroger's claim against Owen Equipment "was entirely separate from her original claim against [the third party] . . .." *Id.* at 376.

The underlying rationale of this Court's holding in *Kroger* centers on the fact that there was *no* claim aganist Owen Equipment that Kroger could have brought originally in federal court. This rationale also controlled in the "pendent *party*" case of *Aldinger* v. *Howard*, 427 U.S. 1 (1976) also cited by the petitioners. Given this Court's then view of the term "person" within the meaning of 42 U.S.C. § 1983 and its jurisdictional counterpart, 28 U.S.C. § 1343, there was *no* original action in federal court that the plaintiff in *Aldinger* could have brought against the defendant county.

The instant case is conceded by the petitioners to be one which the respondent could have brought originally in federal court. No party now challenges the propriety of the removal of the respondent's action. Thus, under *Gibbs*, the courts below had the *power* to decide state claims pendent to substantial federal claims within their original jurisdiction. The Court of Appeal's determination to resolve this case on the basis of pendent claims intertwined with *one* of the respondent's federal statutory claims is unexceptionable, and is con-

sistent with the methodological approach designed to avoid constitutional questions favored by this Court. *Hagans* v. *Lavine*, 415 U.S. 528, 546-547 (1974) (analyzing *Gibbs*).

The petitioners' assertion that the respondent's claims were dismissed before trial is misleading at best. There was no trial in this case. *All* issues were resolved simultaneously on the petitioners' motion for summary judgment and the respondent's motion for partial summary judgment. The record in this case consists for the most part of deposition testimony, answers to interrogatories, responses to admission requests, various documents, and lengthy responses by the parties to various procedural orders entered by the district court. This record was generated during the four years this case was pending in that court. Given the analysis of *one* federal issue by the Court of Appeals, Appendix to Petition 11a-17a, it should be clear that the respondent's federal issues were not "so remote or play[ing] such a minor role at the trial that in effect the state claim only was tried." *Gibbs*, *supra* at 728. The lower courts' resolution of respondent's pendent state claim was consistent with the jurisdictional and prudential considerations set forth in *Gibbs*. And as *Gibbs* makes clear, the exercise of pendent jurisdiction may be proper where all federal claims of a plaintiff are rejected on their merits. *Id*. See also, *Rosado* v. *Wyman*, 397 U.S. 397, 404-405 (1970).

B. *Ancillary Jurisdiction.*

The petitioners counterclaimed against the respondent. They sought restitution of all monies paid to the respondent under the temporary restraining order issued by the State Superior Court. The theory advanced by the petitioners in support of restitution was that the respondent was unjustly

enriched by the payments ordered by the courts below.[5] The respondent raised specific defenses to the petitioners' counterclaim which in part mirrored its *affirmatively raised* pendent state law contract claims. It asserted that it did not profit from the payments, that all monies received were expended on patient care,[6] that the *petitioners* would be unjustly enriched by restitution, that respondent was entitled to be paid for services rendered to patients on *quantum meruit* grounds, and that petitioners were not entitled to the equitable remedy of restitution because they had unclean hands. (1st Cir. App. 542-543.)

The petitioners assert that their counterclaim was compulsory and within the ancillary jurisdiction of the courts below. (Petition 50-51.) For purposes of argument the respondent accepts these asserted legal conclusions. See *Baker* v. *Gold Seal Liquors*, 417 U.S. 467, 469 n.1 (1974). ("If a counterclaim is compulsory, the federal court will have ancillary jurisdiction over it even though ordinarily it would be a matter for a state court . . .") If their counterclaim was com-

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[5] In their counterclaim, the petitioners requested the following relief:

> 4. Determining that plaintiff has been unjustly enriched by DPW as a result of plaintiff's use of a preliminary injunction without bond in this case and that Newfield House is liable in restitution to DPW in the amount of $25.00 per day per eligible Medicaid patient since the imposition of the temporary restraining order September 30, 1976;
>
> 5. Requiring plaintiff to make restitution to DPW in a sum equal to the total payments made to it pursuant to the temporary restraining order and preliminary injunction [*sic*] obtained in this case.

1st Cir. App. 270.

[6] At times material to this case federal law entitled the respondent to "cost-related" reimbursement for services rendered. 42 U.S.C. § 1396a(a)(13)(E). The "cost-related" requirement was repealed in 1980 by Public Law 96-499, § 962.

pulsory, and within the lower courts' ancillary jurisdiction, the petitioners cannot object to the respondent defending against it or to the lower courts having the *power* to decide the issues raised by it. *Owen Equipment & Erection Co.* v. *Kroger, supra* at 375-377.

In the district court, the petitioners conceded that their counterclaim involved an equitable remedy and that it could be perceived as a "harsh" result if they were to be afforded complete relief on their counterclaim, 1st Cir. App. 527-528. The lower courts followed the petitioners' suggestion, set forth in one of their memoranda, and applied their "broad equity powers to fashion a remedy that attempt[ed] to accommodate the interests of both parties." 1st Cir. App. 528. In so doing, the lower courts denied the petitioners' full relief on their counterclaim. The district court emphasized that the *petitioners* would be unjustly enriched by restitution.[7] (Appendix to petition 60a.) The Court of Appeals emphasized that *quantum meruit* as well as unjust enrichment principles militated against the petitioners' claim. (Appendix to Petition 29a-33a.) In short, the petitioners were denied relief on equitable grounds wholly distinct from contract principles.

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[7] The respondent was ordered to repay the petitioners $8,538.74, reflecting the difference in the Home's private and Medicaid rates. *In toto*, the petitioners paid $53,305.31 pursuant to the restraining order. They received one-half that amount from HEW. Full restitution would thus have enriched them by one half of $53,305.31. Moreover, the petitioners would be unjustly enriched since, had the patients relocated, they would have had to pay more for their care. (Appendix to Petition 31a.) In this regard, it is appropriate to measure the petitioners' "loss" from the perspective of the situation they would have been in had the patients been relocated. This is in accord with the principle that a party entitled to recover on a contract must deduct from its recovery the expenses it would have incurred had the contract been carried out. Otherwise, the party would be "in a better position than it would have occupied if the contract had been fully performed." *Magnolia Metal Co.* v. *Gale*, 189 Mass. 124, 133, 75 N.E. 219, 220 (1905).

Because the courts below rejected the petitioners' claims for relief on the discrete non-contract issues raised by their counterclaim, a pleading conceded by the petitioners to be within the ancillary jurisdiction of the lower courts, 1st Cir. App. 520-521, this case implicates no Eleventh Amendment issues and is a particularly inappropriate one for granting certiorari. *Federal Deposit Ins. Corp.* v. *Otero*, 598 F.2d 627, 633 (1st Cir. 1979) (ancillary jurisdiction over counterclaim which raised issues identical to defenses in main action).[8]

III. The Decisions of the Courts Below Are Not Precluded by the Eleventh Amendment.

A. *Prospective Injunctive Relief.*

The petitioners' Eleventh Amendment argument is premised on the fact that the Court of Appeals resolved this case on state law issues within its pendent and ancillary jurisdiction. Because the respondent's constitutional claims were not addressed, and because *one* of its federal claims was narrowly rejected on appeal, the petitioners argue that the rationale of *Ex parte Young*, *supra*, is absent from this case because state officials were not required to conform their conduct to federal or constitutional law, and therefore the state court restraining order was somehow transformed into a retroactive monetary award against the Commonwealth.

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[8] The *Otero* case provides a useful discussion of the limited scope of the holdings in *Aldinger* v. *Howard*, *supra*, and *Owen Equipment & Erection Co.* v. *Kroger*, *supra* at 630-633. For example, the result in *Kroger* is appropriate so that a "plaintiff cannot evade the requirement of complete diversity by joining only defendants from other states and awaiting impleader to join claims against non-diverse parties." *Id.* at 632.

The petitioners' tortured reasoning is unprecedented. Their logic would require a federal court to address all federal statutory and constitutional questions whenever state officials are sued notwithstanding a controversy could be resolved on a state law claim within the court's pendent or ancillary jurisdiction. This Court has never required such a result either on constitutional or prudential grounds. *Rosado* v. *Wyman*, *supra* at 405; *Hagans* v. *Lavine*, *supra* at 545-550 (addressing dissenters' reading of *Gibbs*). In addition, as the foregoing authorities and *Gibbs* make clear, the petitioners focus on the Court of Appeals' contract analysis begs all questions relating to pendent (and ancillary) jurisdiction since, by definition, a pendent state law claim cannot *by itself* be brought in the federal courts.

The district court affirmed the propriety of the state court restraining order and rejected the premise underlying the petitioners' Eleventh Amendment claim by correctly ruling that the injunctive relief issued in this case was prospective in nature and had not become transmogrified into a retroactive monetary award against the Commonwealth. (Appendix to Petition 55a-56a.) The petitioners expressly conceded in the district court that the injunctive relief entered by the State Superior Court did not violate the Eleventh Amendment because it operated prospectively against state officials.[9] In

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[9] In opposing the respondent's motion to remand, the petitioners stated:

> II. The Eleventh Amendment to the United States Constitution does not Deprive this Court of Original Jurisdiction Over the Present Controversy.
>
> In its motion to remand, respondent asserts that the "eleventh amendment to the United States Constitution deprives this court of original jurisdiction over Newfield House's state action, and therefore Newfield House's state action may not be removed to this court under 28 U.S.C. § 1441." Motion to remand, ¶ 2. See also, Motion to Remand, ¶s 3, 11 and 13. Such an assertion ignores the decisions of the

oral argument before the Court of Appeals, they conceded not only that the district court had the *power* to order the injunction issued by the state court but also that the exercise of that power by the district court would be proper in this case.[10] Even if the respondent had not prevailed on any federal claims

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United States Supreme Court and lower federal tribunals which have unequivocally stated that the Eleventh Amendment does not restrict a district court's jurisdiction to hear claims for declaratory and prospective injunctive relief against state officers. *Edelman* v. *Jordan*, 415 U.S. 651, 664-65 (1974) (class action against Illinois officials for administering federal-state programs of aid to the aged, blind, disabled in conformity to state regulation that allegedly violated federal law). In reaching this decision the Supreme Court recognized that a state might be the real party in interest despite the fact that individual officials are nominal defendants. Nevertheless, the court distinguished between cases involving an award of retroactive payments of statutory benefits found to have been wrongfully withheld and a prospective injunction against failing to comply with federal regulations. *Edelman* at 673. The court approved the latter as consistent with *Ex Parte Young*, 209 U.S. 123 (1908). *Edelman* at 675.

Significantly, the court also approved ancillary effects on a state treasury which might result from compliance with a prospective decree. . . . In analogyzing this case one notes that the preliminary injunction entered here has an even closer ancillary relationship to an ultimate order of prospective injunctive relief than an award of attorney's fees . . . .

See note 2, *supra*.

[10] In a literal sense, no federal court ordered injunctive relief against the petitioners. On removal, prior state court orders remain in effect because the court to which a case is removed takes the case as it finds it. *Duncan* v. *Gegan*, 101 U.S. 810, 812 (1879). Thus, the State Superior Court injunction remained in effect on removal. This does not mean, as the petitioners intimate, Petition 45, that the district court, after removal, entered the order. The district court took no action on the petitioners' motions to dissolve and to clarify the restraining order; such inaction had the *effect* of maintaining the state court order intact. The only affirmative ruling made by the district court in relation to the state court restraining order was to deny as moot the petitioners' motion to dissolve that order.

(*i.e.*, assuming the Court of Appeals had reached and decided *all* constitutional and federal law issues adversely to the respondent), that would not transform the state court injunctive order into a retroactive one for monetary relief against the Commonwealth. No case cited by the petitioners so holds. Courts which have addressed the issue have rejected the petitioners' claim. For example, in *Becker* v. *Conn*, 518 F. Supp. 740, 746-747 (E.D. Ky. 1980), state officials paid out monies to provide welfare benefits pursuant to a court order. When the injunctive order was withdrawn, the state defendants argued that the Eleventh Amendment had been violated. Noting that the "state's right of recoupment" was at issue, the court held that "[w]hat is involved, then, is not an award of damages against the state, but . . . plaintiff's defense against potential claims by the state. Therefore, the Eleventh Amendment is not a bar." *Id.* at 747.

It is indeed questionable whether the petitioners are in a position to raise Eleventh Amendment or any other objection to the state court's restraining order. They never appealed that order and never appealed the denial of their motion to dissolve the state court injunction. Instead, they sought to vindicate such rights as they had by counterclaiming in restitution.[11] As noted above, the balancing of competing equities by the courts below was proper, involved a matter brought by the petitioners within the courts' ancillary jurisdiction, and implicated no Eleventh Amendment considerations. Put another

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[11] In appealing to the Court of Appeals, the petitioners raised two issues. One concerned their rights against HEW. The other issue was:

> Whether the District Court properly concluded that the state defendants were not entitled to equitable restitution upon their counterclaim in the full amount of the Medicaid reimbursements which the state defendants provided to the plaintiff pursuant to the interlocutory orders of the Massachusetts Superior Court which the District Court continued.

way, the petitioners cannot be heard to complain because the courts below addressed their claim for return of the money paid pursuant to the state court restraining order under the sole theory they advanced.

B. *Waiver.*

The Court of Appeals correctly held that the petitioners waived any Eleventh Amendment defense they might have had. The court's waiver ruling was premised on factors unique to this case — the petitioners' expressly stated position that the Eleventh Amendment did not bar the state court restraining order, the petitioners' attempt to manipulate jurisdiction through removal to deprive the respondent of a forum for its pendent claims and its defenses to the petitioners' counterclaim, and the petitioners' affirmative assertion of their own equitable claims by way of counterclaim.

The petitioners make the general argument that removal to federal court cannot bear on the question of waiver because a removing party may raise jurisdictional arguments in the court to which the action has been removed. (Petition 47-50.) The particular jurisdictional arguments raised by a removing party become significant. As the petitioners' marshalled authorities demonstrate, a removing party may make jurisdictional arguments based on (1) defects in the state court's jurisdiction,[12]

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[12] Removal jurisdiction is frequently characterized as derivative. If an action is without a state court's jurisdiction, a federal court is said to be without jurisdiction even if the plaintiff's action could have been brought initially in federal court. *Minnesota* v. *United States*, 305 U.S. 382, 389 (1939), cited at page 49 n.14 of the Petition, illustrates these principles and makes clear that the plaintiff in that case would not be without a forum since the federal defendant was subject to an original suit in federal court. In this case there is no dispute that the state court had jurisdiction over the initial complaint filed by the respondent and removed to federal court. In addition, with respect to the respondent's pendent contract claim, the Commonwealth is subject to suit in contract in state court. Mass. G.L. c. 258, § 1, recodified at Mass. G.L. c. 258, § 12.

(2) lack of original jurisdiction in the federal court,[13] or (3) improper service of process in connection with the state court proceeding.[14]

What removal may not result in is the preclusion of a party from raising a claim or defense in any forum. In *Bor-Son Bldg. Corp.* v. *Heller*, 572 F.2d 174, 181 (8th Cir. 1978), the court noted:

> We do not think that Section 1442(a)(1) contemplates a procedure whereby the [defendant federal officer] can remove a case from a state court of *competent* jurisdiction and subsequently obtain *dismissal* on the basis that the federal court to which removal is effected is not a court of competent jurisdiction. (Emphasis in original.)

No authority cited by the petitioners squarely upholds the result they tried to achieve in this case — denying the respond-

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[13] The petitioners' authorities typically involve diversity cases. See, *e.g.*, *M.C. & L.M. Railway Co.* v. *Swan*, 111 U.S. 379 (1884); *Belle View Apartments* v. *Realty Refund Trust*, 602 F.2d 668 (4th Cir. 1979). See also *American Fire and Cas. Co.* v. *Finn*, 341 U.S. 6, 17-18 (1951) (no diversity); *Hudson* v. *Smith*, 618 F.2d 642 (10th Cir. 1980) (following removal under 28 U.S.C. § 1441(c), claims without diversity remanded to state court). In such cases, if lack of diversity is present, a plaintiff would be free to sue an in-state defendant in state court. In this case, *both* the federal and state courts had jurisdiction over the respondent's action. This fact distinguishes *Medlin* v. *Boeing Vertol Co.*, 620 F.2d 957 (3rd Cir. 1980), a case in which a defendant in counterclaim was held to possess only state law claims. Moreover, in the cases cited by the petitioners, no party was deprived of any forum in which to litigate claims or defenses.

[14] Service of process is not at issue in this case, making *Mechanical Appliance Co.* v. *Castleman*, 215 U.S. 437 (1910); *General Inv. Co.* v. *Lake Shore Ry.*, 260 U.S. 261 (1922); *Garden Homes* v. *Mason*, 238 F.2d 651 (1st Cir. 1956); *Dragor Shipping Corporation* v. *Union Tank Car Company*, 378 F.2d 241 (9th Cir. 1967); *Hasse* v. *American Photograph Corporation*, 299 F.2d 666 (10th Cir. 1962), distinguishable. (Petition 47-49, 52.)

ent a forum in which to raise state law claims and state law defenses to a counterclaim.

On removal, the petitioners were presented with the opportunity of asserting whatever Eleventh Amendment immunity they might have had. In response to the respondent's motion to remand citing the Eleventh Amendment, the *petitioners* represented that the Eleventh Amendment was not a bar to the restraining order entered by the state court because that order operated against state officials with a permissible "ancillary" effect on the state treasury. See notes 2 and 9, *supra*. This is *not* a case of constructive waiver; waiver was expressly made. This is *not* a case where waiver is claimed to result from the filing of an answer, from the entry of a general appearance, or from the defense of a case on its merits. Rather, this is a case where counsel for the petitioners expressly represented that the Eleventh Amendment was no bar to the injunctive relief afforded to the respondent.

The disavowal by the petitioners of the Attorney General's authority to waive Eleventh Amendment immunity is, if anything, curious. *Feeney* v. *Commonwealth*, 373 Mass. 359, 366 N.E.2d 1262 (1977) involved an answer by the Supreme Judicial Court of Massachusetts to a question certified by this Court. State officials did not want to appeal a case in which they were named defendants. This Court inquired as to the authority of the Attorney General to prosecute an appeal in such circumstances. The Supreme Judicial Court upheld the Attorney General's authority to appeal. The representations in the brief of the Attorney General filed in the Supreme Judicial Court on the question certified by this Court, are revealing. Written before the Attorney General had the motivation spurred by this case to adopt a modest view of his powers, the brief affirmatively states that the Attorney General has broad authority to establish legal policy for the Commonwealth:

> . . . The literal language of G. L. c. 12, § 3, its legislative history and its manifest purpose suggest that the Attorney General controls the course of all civil litigation. He is authorized to formulate a unified and consistent legal policy for the Commonwealth, and in the exercise of that authority he is subordinate to no other state officer.

Brief for Defendant 17.

The plaintiff in *Feeney* argued that the Attorney General's authority did not extend to federal litigation. The Attorney General countered by maintaining that his broad authority extended to federal litigation particularly where, as in this case, state officials are sued in their official capacities pursuant to the "fiction of naming individual officers" sanctioned by *Ex Parte Young, supra. Id.* at 24-25. In such cases, the Attorney General argued that his broad authority to "formulate . . . legal policy for the commonwealth" was particularly necessary.

The authority of the Attorney General to override executive prerogatives in the context of litigation has been expressly upheld by the Supreme Judicial Court of Massachusetts. *Feeney* v. *Commonwealth, supra*; *Secretary of Administration & Finance* v. *Attorney General*, 367 Mass. 154, 328 N.E.2d 334 (1975). These holdings support the Attorney General's own stated articulation as to the broad authority he possesses to represent and bind the Commonwealth in civil litigation where state officials are parties defendant. By consistently representing that the Eleventh Amendment was not a bar to the restraining order entered in State Superior Court, the Attorney General acted within his authority in waiving whatever immunity that amendment afforded his clients.[15] *Vargas* v.

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[15] The petitioners cite dicta in three cases for the proposition that Massachusetts has a well-established policy that it cannot be sued without its con-

Trainor, 508 F.2d 485, 492 (7th Cir. 1974), *cert. denied*, 420 U.S. 1008 (representations through Attorney General that benefits would be restored to recipients of public assistance could not be repudiated and represented "deliberate" waiver of Eleventh Amendment); *Vecchione* v. *Wohlgemuth*, 558 F.2d 150, 155-159 (3rd Cir. 1977), *cert. denied*, 434 U.S. 943 (attorneys were authorized to appear for state official and, where no argument made that attorneys exceeded authority in signing consent decree, immunity conferred by Eleventh Amendment was waived by decree); *N.Y.S. Ass'n for Retarded Children* v. *Carey*, 596 F.2d 27, 39 (2d Cir. 1979), *cert. denied*, 444 U.S. 836 (signing of consent decree constituted waiver of Eleventh Amendment immunity). In *Vargas*, the court held in part:

> A representation made in a judicial proceeding for the purpose of inducing the court to act or refrain from acting satisfies the requirements stated in *Edelman*.

508 F.2d at 492.

In addition to the Attorney General's express representations, the Court of Appeals cited the petitioners' removal ac-

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sent. (Petition 35-36.) The issues decided in the cases were narrow and concerned, typically, issues of statutory construction. For example, *McArthur Brothers Co.* v. *Commonwealth*, 197 Mass. 137, 83 N.E. 334 (1908) concerned whether new procedural rules permitted an auditor to decide damage issues under a statute authorizing judges to do so. Questions as to the Attorney General's authority to waive immunity and to bind state officials who are parties defendant were not addressed. The narrowness of the holdings of cases cited by the petitioners is underscored by the refusal of the Supreme Judicial Court to extend the scope of the principal case they rely on, *Broadhurst* v. *Director of the Division of Employment Security*, 373 Mass. 720, 369 N.E.2d 1018 (1977), beyond the specific narrow issue addressed. *Sargeant* v. *Commissioner of Public Welfare*, Mass. Adv. Sh. (1981) 1476, 1481-1482, 423 N.E.2d 755, 759-760.

tion and imposition of a counterclaim as supporting its waiver holding. The Court of Appeals' holding is correct. *Gallagher* v. *Continental Insurance Company*, 502 F.2d 827, 830 (10th Cir. 1974) (removal held to be waiver). The compulsory nature of the petitioners' counterclaim does not change this conclusion. The Court of Appeals correctly focused on the fact that the petitioners brought suit against the respondent seeking the equitable remedy of restitution. By removing this case the petitioners, by their own action, determined the forum which would decide *their* law suit. The respondent possessed equitable defenses, including defenses sounding in *quantum meruit* and unjust enrichment, to the petitioners' request for the equitable remedy of restitution. The respondent was entitled to raise its defenses in whatever forum the petitioners' counterclaim was litigated. And, predictably, the petitioners do *not* claim that the lower courts lacked jurisdiction over their counterclaim even with respect to the DPW. See note 5, *supra*.

From one perspective, the Court of Appeals' waiver holding with respect to removal and the petitioners' suit against the respondent is an affirmation of ancillary jurisdiction over the petitioners' counterclaim. In addition, that holding is consistent with uniform decisional law that the Eleventh Amendment may not be asserted offensively, *Becker* v. *Conn*, *supra*; *Aldens, Inc.* v. *Ryan*, 454 F. Supp. 465, 470 and n.3 (W.D. Okla. 1976) (assertion by state of counterclaim one aspect of "conduct inconsistent with the assertion of Eleventh Amendment immunity"); *Maryland Port Administration* v. *SS American Legend*, 453 F. Supp. 584, 590 (D. Maryland 1978) (where state sues it waives immunity and subjects itself to counterclaim arising out of same transaction); *Department of Transp. Ill.* v. *American Com'l Lines, Inc.*, 350 F. Supp. 835, 836-838 (N.D. Ill. 1972) (after removal, state agency's motion to strike plaintiff's counterclaim on Eleventh Amendment

grounds denied); *Commonwealth of Puerto Rico* v. *Sea-Land Service, Inc.*, 349 F. Supp. 964, 976-978 (D. Puerto Rico 1970) (waiver where Commonwealth sued for breach of contract); *Port Royal and A. Ry. Co.* v. *State of South Carolina*, 60 F.552 (D. So.Car. 1894) (state suing in federal court subject to cross-bill arising out of same transaction), and with the principle that ". . . Congress did not intend to confine the jurisdiction of federal courts so inflexibly that they are unable to protect legal rights or effectively to resolve an entire, logically entwined lawsuit." *Owen Equipment and Erection Co.* v. *Kroger, supra* at 377.[16]

Conclusion.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[16] The Court of Appeals characterization of the petitioners' attempt to manipulate jurisdiction as "a virtual fraud on the federal court and opposing litigants," Appendix to Petition 68a, is well-taken. The petitioners expressly informed the families of the respondent's patients that their benefits were protected as long as the state court restraining order remained in effect. Such action undermined the respondent's efforts to relocate its Medicaid patients, thereby increasing the respondent's potential liability on the petitioners' counterclaim. The petitioners' position in this case would sanction their efforts to exacerbate the respondent's potential liability to them, while leaving the respondent defenseless to the petitioners' counterclaim seeking to recover on that liability.

Appendix.

42 C.F.R. § 449.10(b)(15)(v)(1977).

[At times material to this case this regulation was previously codified at 45 C.F.R. § 249.10(b)(15)(v)(1976).]

(v) The term "intermediate care facility" also includes any facility located on an Indian reservation, which provides, on a regular basis, health related care and services and is certified by the Secretary as meeting the provisions of paragraph (b)(15)(i)(C) of this section and the standards of §§ 449.12 and 449.13.

With respect to intermediate care facility services furnished by an intermediate care facility whose provider agreement has expired or has otherwise terminated, the State agency may continue to claim Federal financial participation in payments on behalf of eligible individuals for such services furnished by such facility during a period not to exceed 30 days in starting with the date of expiration or other termination of its provider agreement, but only if such individuals were admitted to the facility before the date of expiration or other termination of its provider agreement, and if the State agency makes a showing satisfactory to the Secretary that it has made reasonable efforts to facilitate the orderly transfer of such individuals from such facility to another facility.

42 C.F.R. §§ 449.33(a)(4)(6) (1977).

[Previously codified at times material to this case at 45 C.F.R. § 249.33(a)(4)(6) (1976).]

(a) *State plan requirements.* A State plan for medical assistance under title XIX of the Social Security Act must:

. . . . . .

(4) Provide that certification by the survey agency designated pursuant to § 450.100(c) of this chapter will be subject to the following provisions and exclusions:

(i) For purposes of paragraph (a)(1)(i) of this section, the facility is in compliance with each condition of participation as determined by the manner and degree to which the facility satisfies the standards within each condition;

(ii) For purposes of paragraphs (a)(1)(i) and (a)(2) of this section, the facility is in full compliance with the standards or meets the following conditions for any standards not fully met:

(A) The deficiencies noted, individually or in combination neither jeopardize the health and safety of patients nor are of such character as to seriously limit the provider's capacity to render adequate care. A written justification of such findings is maintained on file by the survey agency; and

(B) The facility provides in writing a plan of correction acceptable to the survey agency;

(iii) In the case of facilities certified under the provisions of paragraph (a)(4)(ii)(A) and (B) of this section certification will be for:

(A) A period that is no later than the 60th day following the end of the time period specified for the correction of deficiencies in a written plan which the survey agency has approved; however in no case may the certification period exceed 12 full calendar months except as provided for under paragraph (a)(2)(i) or (ii) of the section or

(B) A conditional term of 12 full months, subject to an automatic cancellation clause that the certification will expire at the close of a predetermined date which is no later than the 60th day following the end of the time period specified for the correction of deficiencies: *Provided*, That such date will occur within such 12-month period, unless the survey agency finds that all required corrections have been satisfactorily completed, or unless the survey agency finds and notifies the State agency that the facility has made substantial progress in correcting such deficiencies and has resubmitted in writing a new plan of correction acceptable to the survey agency. Except as

provided in paragraph (a)(6) of this section, the period of a certification shall not exceed 12 calendar months.

. . . . . .

(6) Provide that execution of the single State agency provider agreement with a facility for payments under the plan shall be contingent upon certification in accordance with the provisions of paragraph (a)(1) and (2) of this section. The term of an agreement may not exceed a period of 1 year and the effective date of such agreement may not be earlier than the date of certification. Execution of a provider agreement shall be for the term and in accordance with the provisions of certification determined by the survey agency except that the single State agency for good cause based on adequate and documented evidence may elect to execute a provider agreement for a term less than the full period of certification or may elect not to execute a provider agreement or may cancel a provider agreement for participation by a facility certified under the State plan. Notwithstanding the provisions of this subparagraph the single State agency may extend such term for a period not exceeding 2 months where the survey agency has notified the single State agency in writing prior to the expiration of a provider agreement that the health and safety of the patients will not be jeopardized thereby, and that such extension is necessary to prevent irreparable harm to such facility or hardship to the individuals being furnished items or services or that it is impracticable within such provider agreement period to determine whether such facility is complying with the provisions and requirements under the program.

MASSACHUSETTS GENERAL LAWS CHAPTER 151B, § 4(10).

§ 4. Unlawful practices
It shall be an unlawful practice:

. . . . . .

10. For any person furnishing credit, services or renting accommodations to discriminate against any individual who is a recipient of federal, state or local public assistance, including medical assistance, or who is a tenant receiving federal, state or local housing subsidies, including rental assistance or rent supplements, solely because the individual is such a recipient.

MASSACHUSETTS GENERAL LAWS CHAPTER 258, § 1
[Since recodified at Mass. Gen. Laws Ann. ch. 258, § 12.]

The superior court, except as otherwise expressly provided shall have jurisdiction of all claims against the commonwealth.